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No. 98-2006-CSX Title: Michael Cloer and Pastors for Life, Inc., Petitioners
v.
Gynecology Clinic, Inc., dba Palmetto State Medical Center

Docketed:
June 15, 1999

Court: Supreme Court of South Carolina

Entry	Date	Proceedings and Orders
	Jun 14 1999	Petition for writ of certiorari filed. (Response due August 14, 1999)
	Jul 15 1999	Order extending time to file response to petition until August 14, 1999.
	Aug 25 1999	DISTRIBUTED. September 27, 1999
	Sep 17 1999	Response requested.
	Oct 18 1999	Brief of respondent Gynecology Clinic, Inc. in opposition filed.
	Nov 3 1999	REDISTRIBUTED. November 24, 1999
	Nov 8 1999	Reply brief of petitioners Michael Cloer, et al. filed.
	Nov 29 1999	REDISTRIBUTED. December 3, 1999
	Dec 1 1999	Record requested.
	Dec 13 1999	Record filed.
	Jan 3 2000	REDISTRIBUTED. January 7, 2000
	Jan 10 2000	Petition DENIED. Dissenting opinion by Justice Scalia, with whom Justice Thomas joins. (Detached opinion.)

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No. 98-

IN THE

Supreme Court of the United States

PASTOR MICHAEL CLOER AND PASTORS FOR LIFE, INC.
Petitioners,

v.

THE GYNECOLOGY CLINIC, INC.,
D/B/A PALMETTO STATE MEDICAL CENTER,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A state court injunction restricts various expressive activities on public sidewalks. The Supreme Court of South Carolina affirmed the injunction, and the judgment upon which it was based, even though the conduct giving rise to the judgment against Petitioners was lawful and consisted of actions protected by the rights to freedom of speech, peaceable assembly, and religion.

The following questions are presented:

1. Does the First Amendment forbid the imposition of injunctive liability for the commission of admittedly *lawful*, *constitutionally protected* acts?

2. Does the imposition of an injunction without individualized findings of *unlawful* conduct violate due process?

3. Does imposition of state law civil liability for the exercise of federal constitutional rights violate the Supremacy Clause of the United States Constitution?

4. Does the injunctive creation of a "speech-free zone" on a public sidewalk near Respondent's abortion business, without any individualized findings of *unlawful* conduct, violate the Petitioners' rights to freedom of speech, peaceable assembly, and religion?

PARTIES

All of the petitioners are listed in the caption on the cover. Pastors for Life, Inc., is a not-for-profit corporation that has neither parent nor subsidiary corporations. *See* Rule 29.6.

No other persons or entities, other than the one listed in the caption on the cover, were respondents in the proceedings below or are respondents in this Court.

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INTRODUCTION

In an astounding decision, the Supreme Court of South Carolina has concluded that injunctive liability may be imposed and restraints on paradigmatic expression suffered as a consequence of engaging in *lawful*, *constitutionally protected* activities. The abbreviated reasoning to support the decision below is as follows:

> *Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy*. Under South Carolina law, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another. The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. *Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy*.

Pet. App. at 2a (internal quotation marks and citations omitted, emphases added).

The Petitioners, Pastor Michael Cloer and Pastors for Life, Inc., respectfully request that this Court grant the petition for a writ of certiorari in order to reverse the decision below.

DECISIONS BELOW

The decision of the Supreme Court of South Carolina is not yet published. Pet. App. 1a. The orders and opinions of the Court of Common Pleas of Greenville County are unreported. App. 4a-23a.

JURISDICTION

The South Carolina Supreme Court issued its opinion affirming the judgment of the Court of Common Pleas of

Greenville County on March 15, 1999. This Court has jurisdiction under Title 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The following constitutional and statutory provisions involved in this case are set forth in the Appendix to the Petition: United States Constitution Art. VI, cl. 2 and amends. I and XIV § 1; S.C. Code Chapter 32.

STATEMENT OF THE CASE

A. Statement of Material Facts

Gynecology Clinic, Inc. ("Gynecology Clinic") is a medical business in Greenville, South Carolina. Palmetto State Medical Center is a transaction name of the Clinic. Among other things, Gynecology Clinic performs abortions.

Michael Cloer is the senior pastor of Siloam Baptist Church in Easley, South Carolina. Since 1989, he has engaged in expressive activities on the public sidewalks near Gynecology Clinic. These activities include prayer, reading scripture, explaining the right to life to others, describing the wrong of abortion, and offering alternatives to abortion. He has also shared various written materials, displayed posters, preached, and sung. Concerned citizens, including other people of faith, have joined Pastor Cloer in these activities.

Because he is opposed to legalized abortion, Pastor Cloer has led these activities, joined in them, and supported them. His opposition to all human abortion is based on his religious faith and the values derived from them. The expressive activities reflect his purpose and design of bringing to an end the present, legal status of abortion in this country *and* his intention to try,

through lawful means, to prevent abortions at Gynecology Clinic.

Pastor Cloer founded and directed Pastors for Life, Inc. ("Pastors for Life"). Pastors for Life has two corporate purposes: providing pro-life education and offering alternatives to abortion. Although not a membership organization, Pastors for Life welcomes the participation in its activities of any pastor who shares its doctrinal view on the sanctity of human life. Pastors interested in the work of the group meet monthly to pray and to discuss the promotion of pro-life activities in their respective congregations.

From the inception of their activities, Pastor Cloer and Pastors for Life have objected only to one thing: human abortion. Neither Pastor Cloer nor Pastors for Life have acted from a purpose of driving Gynecology Clinic out of business or forcing it to endure any financial injury. Pastor Cloer and Pastors for Life did not join with any other person in a plan or design to injure the Gynecology Clinic or its employees and agents. Pastor Cloer and Pastors for Life have no other interest in what occurs at Gynecology Clinic except that the business performs abortions that, according to Pastor Cloer's understanding, are abhorrent to and violative of God's law.

B. Statement on Preservation Below of Federal Questions

1. *The Federal Questions Were Raised and Preserved in the Trial Court.*

Gynecology Clinic filed suit in the Court of Common Pleas of Greenville County on or about August 9, 1994. Respondent alleged three causes of action based on private nuisance, public nuisance, and civil conspiracy, and requested damages, injunctive relief, and other relief.

On or about August 12, 1994, the Court of Common Pleas granted an *ex parte* temporary restraining order, *see* Order, Pet. App. at 4a. That Order prohibited Petitioners and others from: offering written literature or oral counsel to persons in vehicles crossing the public sidewalk onto the driveway serving Gynecology Clinic; assembling on the public sidewalk adjacent to Gynecology Clinic; standing or walking across Gynecology Clinic's driveway; using bullhorns or any other noise making device, including any excessive noise making, within a hundred and fifty feet of the property line. *Id.* In addition, the temporary restraining order created a twenty foot speech free zone from which Petitioners and others were ordered to remove themselves.[1]

On September 7, 1994, the court held an evidentiary hearing on Respondent's motion for a temporary injunction.[2] In advance of the hearing, Petitioners filed a memorandum in opposition to the requested injunction. In that memorandum, Petitioners had their first opportunity to raise the federal questions presented here and they did so. Petitioners argued that the requested injunction would suppress their constitutional rights, including the rights of free speech, peaceable assembly, and free exercise of religion. The trial court continued the modified temporary restraining order in place pending the receipt of post-hearing briefs addressing the evidence and the

1. On August 19, 1994, the trial court modified *sua sponte* the temporary restraining order. Pet. App. at 7a.

2. Under South Carolina civil practice, an injunction *pendente lite* is denominated a Temporary Injunction and is the state law equivalent of a preliminary injunction in federal practice.

legal issues.[3]

On or about October 11, 1994, Petitioners moved to dismiss the complaint. In their written argument, Petitioners argued that the activities complained of were pristine forms of constitutionally protected expression. Simultaneous with their motion to dismiss, Petitioners filed their post-hearing memorandum opposing the temporary injunction motion. In that memorandum, Petitioners again objected to the proposed temporary injunction on the ground that the relief requested would suppress the exercise of federal constitutional rights of speech, assembly and religion. Petitioners also objected to the injunction because the only evidence offered against them consisted of evidence that they had engaged in the exercise of their federal constitutional rights of speech, assembly and religion; consequently, Petitioners argued, Gynecology Clinic had not made a prima facie showing on the merits of its claims.[4]

Although the trial court had, on September 7, 1994, ordered the continuation in force of the temporary restraining order pending receipt of the filing by Petitioners of their post-hearing memorandum, no order dissolving the temporary restraining order ever issued. Consequently, on November 16, 1994, Petitioners filed a motion to vacate the temporary restraining order. In the motion, Petitioners again raised the federal

3. The Court of Common Pleas never ruled on the motion for a temporary injunction. Ultimately, the presiding judge recused himself from further consideration of the matter.

4. Under South Carolina civil practice, a temporary injunction will not issue unless the movant makes out a prima facie claim. *See Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 167 S.E.2d 313, 315 (S.C. 1969).

questions presented here, *viz.*, that the *ex parte* temporary restraining order violated federal constitutional rights of free speech, free exercise of religion and peaceable assembly. The Court of Common Pleas never ruled on the motion to vacate the temporary restraining order.

On April 4, 1996, the Court of Common Pleas heard and decided Petitioners' motion to dismiss. That court concluded that the public nuisance claim was not well-pled and dismissed it. The court denied the motion to dismiss as to the private nuisance and civil conspiracy claims. Thereafter, on April 24, 1996, Petitioners filed their Answer to the Complaint, together with their Affirmative Defenses and their Jury Demand. The federal questions presented here were again raised and preserved with this filing. Specifically, the Sixth, Seventh, Tenth, Twelfth, Thirteenth, and Fifteenth Affirmative Defenses asserted federal constitutional objections to the relief requested. These Affirmative Defenses also specifically objected to the entry of judgment against Petitioners on the basis of their exercise of federal constitutional rights.

Fifteen days later, Gynecology Clinic gave written notice to the trial court that it was waiving its claim for damages.

In October 1996, the case was heard on the merits as a nonjury matter. On May 14, 1997, the trial court decided the matter; the court granted judgment to Petitioners on the private nuisance claim; the court granted judgment to Gynecology Clinic on its civil conspiracy claim. On the basis of the judgment for Gynecology Clinic on the civil conspiracy claim, the trial court made permanent the modified temporary

restraining order. Pet. App. 17a.[5]

Petitioners sought post-trial relief under South Carolina's relevant rules of procedure. Petitioners' post-trial motion

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5. Under the permanent injunction, the Petitioners are enjoined:

1. At all times and on all days, from trespassing on the private property of Palmetto State Medical Center, including its driveway and parking lot.

2. At all times and on all days, from interfering with the unfettered ingress to and egress from the Palmetto State Medical Center building and its parking lot.

3. At all times and on all days, from interfering with the free flow of traffic on the property of the Palmetto State Medical Center and the public streets and sidewalks of Greenville County. A parked vehicle or a person not on private property of the Palmetto State Medical Center may be approached only so long as the contact is strictly peaceful and does not include the exchange of fighting words or threats. However, any vehicle containing a physician employed by Palmetto State Medical Center or the physician may not be approached.

4. At all times and on all days, from picketing, demonstrating, or in any way congregating on the public sidewalk twelve feet on either side of the driveway of the Palmetto State Medical Center. This area is to constitute a buffer zone. As a general rule this encompassed the space between the while lines painted on the sidewalk. One may walk across this area of the sidewalk only as necessary to reach an unrestricted location.

5. At all times and on all days, from obstructing the view of street traffic by any vehicle that is attempting to exit the Palmetto State Medical Center or to allow the safe egress of traffic onto Laurens, Road, a busy city street.

6. During the hours the clinic is in operation and accepts patients, from making any noise, including the use of any bullhorn or loudspeaker, that would be heard by a person of ordinary hearing inside the walls of the Palmetto State Medical Center.

Pet. App. at 11a-12a.

raised yet again the federal questions presented here. Particularly, Petitioners argued that liability was imposed on them for the exercise of federal constitutional rights and that the injunction violated principles of federal constitutional law. On July 22, 1997, the trial court denied the motions to alter and/or amend the judgment against Petitioners. The trial court found that Michael Cloer had prepared and mailed a letter to Pastors for Life in which he said:

> It would be difficult to overstate the importance of locating a CPC [presumably a 'crisis pregnancy center'] next door to the abortion mill. Not only will the CPC provide a much needed service to mothers and babies in the inner city, but in so doing it will undercut the 'business' of the abortion mill, and thereby play a key role in closing it down.

Pet. App. at 16a-17a. The trial court also found that Richard Cash, an employee of Pastors for Life, stood "at the end of the clinic driveway with a sign that read 'Don't turn in, Keep Going.'" *Id.* In addition, the trial court found that Pastor Cloer used "a bullhorn to coordinate the activities of the sidewalk counselors gathered in front of the clinic." Finally, the trial court found that Richard Cash had been identified by witnesses at the temporary injunction hearing as "having crowded the clinic driveway and having blocked the view" of oncoming traffic. *Id.*

Petitioners timely appealed to the Supreme Court of South Carolina.

2. *The Federal Questions Were Raised and Preserved in the South Carolina Supreme Court.*

On appeal, Petitioners again raised and preserved the federal questions presented here, both in their appellate briefs and in their oral argument. Specifically, they argued that the trial court judgment rested on proof that Petitioners had engaged in conduct protected from infringement by the United States Constitution; Petitioners also argued that the injunction issued by the trial court violated principles of federal constitutional law.

On March 15, 1999, in a brief *per curiam* opinion, the Supreme Court of South Carolina affirmed the civil conspiracy judgment and the terms of the injunction. *See* Pet. App. at 1a. The court stated:

> *Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy.* Under South Carolina law, "lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another.'" *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988).

Pet. App. at 2a (emphasis added). Having decided that conduct protected from infringement under the United States Constitution could give rise to liability for civil conspiracy under South Carolina law, the court examined the record to determine whether the evidence therein support the trial court judgment. The court concluded:

> *The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable.*

> Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy. *LaMotte v. Punch Line of Columbia, Inc., supra.*

Pet. App. at 2a (emphasis added). The court did not address Petitioners' arguments that the terms of the injunction violated federal constitutional principles.

REASONS FOR GRANTING THE WRIT

Twice this Court has reviewed injunctions restraining expressive activities of persons opposed to abortion. *See Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994). Twice this Court has circumscribed the relief granted by the judgments it reviewed. *Schenck*, 519 U.S. at 377 (striking floating bubble zone); *Madsen*, 512 U.S. at 773-74 (striking consent to approach requirement); *id.* at 773 (striking images observable requirement); *id.* at 771 (striking provisions of injunction extending into unrelated private property); *id.* at 774-75 (striking 300-foot speech-free zone around residences of clinic staff).

In *Madsen* and *Schenck*, this Court addressed the issuance of injunctive restrictions on expression in circumstances of *proven, egregious, unlawful* conduct effectively preventing access to the complaining abortion businesses. *Schenck*, 519 U.S. at 362-65, 380-81, 384-85; *Madsen*, 512 U.S. at 769. Here, in stark contrast, *no unlawful conduct* was found by the trial court or the Supreme Court of South Carolina. The trial court starkly contrasted the conduct of the Petitioners with that described by this Court in *Schenck*: "There is a marked difference between the *Schenck* defendants' apparent penchant for violence and the conduct of the present Defendants, which

might be best characterized as zealous." Pet. App. at 16a-17a. The court below pointedly noted that Petitioners' liability did not require proof of *unlawful* conduct and was satisfied by proof of conduct guaranteed from infringement by the First Amendment. Pet. App. at 2a.

The decisions in *Schenck* and *Madsen* reflect the fact that "First Amendment freedoms need breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963). The Supreme Court of South Carolina, however, has girdled the First Amendment freedoms of the Petitioners with a strait-jacket, leaving to the Petitioners no room to breathe and little space for the exercise of these important, delicate and precious freedoms. Moreover, the court below did so without findings of *unlawful conduct*; rather, the court below held specifically that Petitioners' liability could properly be premised upon their *lawful exercise of constitutionally protected rights*.

The decision below directly conflicts with the applicable decisions of this Court regarding the standard of review applicable to injunctions, the obligation of a reviewing court to scrutinize the record, the First Amendment and Due Process requirements that individualized findings of *unlawful* conduct alone are the appropriate justification of injunctive restrictions on constitutional rights, and the public forum and prior restraint doctrines.

Moreover, the decision below raises an important and substantial question of federal constitutional law. The decision of the court below allows the imposition of civil liability under *state* law to be premised upon evidence that Petitioners engaged in lawful expression protected by the *federal* Constitution. The imposition of liability in such circumstances directly affronts the Supremacy Clause of the United States Constitution.

Finally, subsequent to the decision below, on June 1, 1999, a new South Carolina statute took effect, the South Carolina Religious Freedom Act, S.C. Code §§ 1-32-10 *et seq*. That Act, on its terms, is applicable to this litigation. Neither the Supreme Court of South Carolina nor the trial court, however, had the opportunity to consider or decide how the defense to liability provided by the Act would affect the judgment here. For that reason, this case is an apt one in which to grant the petition, vacate the judgment below, and remand the case for further consideration in light of a change in law.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

The decision below directly derogates this Court's precedents.

A. *Madsen v. Women's Health Center, Inc.*

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court concluded that content-neutral injunctive restrictions on expressive activity violate the right to free speech unless, at a minimum, the restrictions "burden no more speech than necessary to serve a significant government interest." *Id.* at 765.[6]

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6. This Court explained further, 512 U.S. at 767, that this test is equivalent to the test set forth in the earlier case of *Carroll v. President of Princess Anne*, 393 U.S. 175 (1968):

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order. . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84. *See Madsen*, 512 U.S. at 767.

Petitioners' expressive activities covered a broad spectrum — from prayer to proclamation, from singing psalms to silence. Petitioners' pro-life speech "is entitled to the fullest possible measure of constitutional protection," *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984) (listing, as example, "Abortion is Murder"). Hence, no exception to the prior restraint doctrine justifies the injunctive restrictions affirmed below.

The court below simply failed to comport its decision with *Madsen*'s teaching. Ignoring *Madsen*, the court below sustained a large-scale amputation of First Amendment jurisprudence. By contrast, the proper constitutional analysis to be applied to a request for injunctive relief entails a searching examination (omitted in the brief *per curiam* decision below).

For example, the court below upheld the injunction even though Petitioners' liability was premised solely upon their exercise of federal constitutional rights. *But see Madsen*, 512 U.S. at 765 n.3 (noting prerequisite that equitable principles be satisfied prior to grant of injunction). Nor is the injunction narrowly tailored to Respondent's claim of civil conspiracy. *But see Madsen*, 512 U.S. at 762 ("the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public"). Here, for example, the injunction prohibits picketing, demonstrating or congregating within a buffer zone even though such activities are unrelated to civil conspiracy, the only claim on which Respondent prevailed. The injunction utterly fails to address conduct related to the commission of a civil conspiracy, instead addressing itself to various restrictions on the constitutional rights and liberties of the Petitioners.

This Court, in *Madsen*, reiterated the point that injunctions of the sort issued below must be limited to those persons who threaten the irreparable harm in question. 512 U.S. at 765 n.3. The court below, however, affirmed the entry of the injunction even though the Petitioners had been shown only to have engaged in *lawful*, *constitutionally protected* conduct.

Further, in *Madsen* this Court crafted an exception to the prior restraint doctrine for injunctive restraints that restrict speech only *indirectly* and only *because of prior unlawful conduct*. 512 U.S. at 763 n.2. The court below affirmed the injunction even though it does not fall within the *Madsen* exception to the prior restraint doctrine. The injunction directly restricts speech by prohibiting "picketing[and] demonstrating" within the buffer zone and by regulating speech other than "strictly peaceful" contacts on the public streets and sidewalks of the county. Pet. App. at 11a.

The court below also disregarded *Madsen* when it upheld the injunction against the Petitioners, rather than limiting such relief to those parties who had engaged in unlawful conduct. Compare *Madsen*, 512 U.S. at 770. The trial court described the conduct at issue in this case as no more than "zealous." Pet. App. at 17a. The court below affirmed the judgment and the injunction even though, as to the Petitioners, it rested only on evidence of *lawful*, *constitutional protected* expression. Pet. App. at 2a.

The court below ignored the requirement identified in *Madsen*, 512 U.S. at 764-66, that injunctive relief serve a significant government interest. Here, the court below never inquired into the nature of such government interests. Evidence in the trial court established that there was no record of traffic

accidents or incidents at the site or in its vicinity. Had the court below, in compliance with *Madsen*, taken pains to examine the record, it would have found nothing to justify the assertion that traffic safety was a significant government interest at stake here.

The decision below directly conflict with *Madsen*.

B. *Schenck v. Pro-Choice Network of Western New York*

The court below upheld the entry of an injunction based on Petitioners' *lawful*, *constitutionally protected* acts and it did so without subjecting the injunction or its terms to the appropriate standard of scrutiny. Although it cited *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), the court below never applied the heightened scrutiny required by *Madsen* and *Schenck* to the injunction or its terms. *See* Pet. App. at 1a-3a. As a result, Petitioners are restrained from exercising federal constitutional rights under the state court injunction without that injunction being shown to be no more burdensome to those constitutional rights than necessary to serve a significant government interest.

Moreover, in *Schenck*, this Court found egregious unlawful conduct proven in the record. Here, the trial court contrasted the record in this case with that in *Schenck*: "There is a marked difference between the *Schenck* defendants' apparent penchant for violence and the conduct of the present Defendants, which might be best characterized as zealous." Pet. App. 17a. In *Schenck*, this Court found that "the buffer zones [were] necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." 519 U.S. at 380. The trial court, however, made no finding that buffer zones were necessary to ensure access, nor is there any

evidence in the record to support such a finding with regard to the conduct of Pastor Michael Cloer or Pastors for Life, Inc.

Unlike Pastor Michael Cloer and Pastors for Life, the *Schenck* protesters, "purposefully or effectively blocked or hindered people . . . from driving in and out of clinic parking lots." *Id.* The trial court did not find as fact any such conduct by Pastor Michael Cloer or Pastors for Life. Not only did the *Schenck* protesters engage in obstructive conduct of an unlawful character, their conduct frustrated the ability of law enforcement to act: "defendants' harassment of the local police made it far from certain that the police would be able to quickly and effectively counteract protesters who blocked doorways . . . ." *Id.* Here, however, Pastor Cloer or Pastors for Life did not engage in any such conduct. No evidence warranted the construction of such buffers by the trial court here. The decision below directly conflict with *Schenck*.

C. *NAACP v. Claiborne Hardware Co.*

The court below upheld a civil conspiracy judgment and an injunction based thereon without any findings that the Petitioners – Pastor Cloer and Pastors for Life – actually engaged in or threatened to engage in *any unlawful activity*. To the contrary, the Supreme Court of South Carolina concluded that a liability could be imposed, and an injunction could issue, based on evidence that the Petitioners had engaged in the lawful exercise of activities protected by the First Amendment. Pet. App. at 2a. That holding squarely conflicts with this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

The First Amendment rights to free speech, assembly, and religion demand that courts carefully distinguish between

lawful and unlawful conduct, and between those who obey the law and those who ignore it. This Court explicitly so held in *Claiborne Hardware Co.* There, this Court reviewed a Mississippi court's order allowing damages and imposing an injunction against civil rights activists. This Court reversed, explaining that while the activists' behavior included "elements of criminality," their conduct also exhibited "elements of majesty." *Id.* at 888. This Court emphasized the obligation of courts to discriminate among lawful and unlawful conduct before imposing injunctive relief or damages:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded. . . . Specifically, *the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.*

Id. at 916-17 (emphasis added, citation omitted). To impose liability, the judgment "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties [used or] agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.* at 933-34.

This Court also concluded that the injunction against the boycott activities of the civil rights activists "must be dissolved" "[f]or the same reasons. . . ." *Id.* at 925 n.67. Further, this Court declared that, at a minimum, "the injunction

must be modified *to restrain only unlawful conduct* and the *persons responsible* for conduct of that character." *Id.* (emphasis added).

The court below completely ignored the instruction given by this Court in *Claiborne Hardware*. The court rejected Petitioners' argument that "because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy." Pet. App. at 2a. As construed by the Supreme Court of South Carolina, "[u]nder South Carolina law, lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another." Pet. App. at 2a (internal quotation marks omitted, citation omitted).

Because the court below refused to separate out *lawful* and *constitutionally protected* activities from *unlawful* or *unprotected* conduct, its review of the evidence led it to conclude that the judgment before it was supported. "The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy." Pet. App. at __a (citation omitted). That startling holding squarely conflicts with the care and precision demanded by the First Amendment and demonstrated in *Claiborne Hardware Co.*

D. *Thompson v. City of Louisville*

The court below upheld a judgment of liability against Pastor Cloer and Pastors for Life while acknowledging that the judgment rested on evidence of *lawful* conduct guaranteed from infringement by the *First Amendment*. Just as "it is a violation of due process to convict and punish a man without evidence of

his guilt," *Thompson v. Louisville*, 362 U.S. 199, 206 (1960), so it is a violation of petitioners' due process rights to hold them civilly liable and enjoin them from the exercise of constitutionally protected rights without evidence of *unlawful* conduct. *Accord Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 18 (1978) ("[a]n injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct") (internal quotation marks omitted, citation omitted).

E. *New York Times Co. v. Sullivan*

This Court has noted on many occasions that it is the duty of a reviewing court "in proper cases" to "review the evidence to make certain that [constitutional] principles have been constitutionally applied." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Reviewing courts must "search the records . . . where a claim of unconstitutionality is effectively made," to ensure that "no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by *insubstantial* findings of fact screening reality." *Claiborne Hardware Co.*, 458 U.S. at 924 (quoting *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1943) (emphasis added)).

In *Milk Wagon Drivers*, this Court upheld an injunction that took within its scope both violent and nonviolent activity. "[I]n that case," "violent conduct . . . was pervasive." In *Claiborne Hardware Co.*, however, this Court ordered the modification of an injunction because the lower court erred in relying on "isolated acts of violence" over the course of several years. This Court concluded that the lower court's ruling "'screens reality' and cannot stand." *Id.* at 924.

This case is not simply about a bare determination of civil liability. An injunction bars the Petitioners from engaging in constitutionally protected lawful conduct on a public sidewalk. Yet the Supreme Court of South Carolina refused to scour the record for evidence of *unlawful* conduct by the Petitioners. The court was satisfied that, under South Carolina law, evidence of Petitioners' *lawful, constitutionally protected* conduct satisfied the Respondent's obligation to prove its case. Pet. App. at 2a.

Both the trial court and the court below "screened reality." Initially, the trial court posited the liability of Petitioners on its conclusion that "the Defendants have both conspired and interfered with the lawful operation" of Gynecology Clinic. Pet. App. at 14a. The court's findings did not identify the particular *unlawful* conduct of the Petitioners supposedly causing any of the Respondent's injuries. Nonetheless, the court entered a judgment against Petitioners; consequently, the Petitioners moved to alter or amend the judgment. In response to that motion, the trial court explained: "the Defendant's [Petitioners'] motion is well-taken in that the May 12, 1997 order perhaps lumps all of the Defendants together too readily." Pet. App. at 19a. That said, the trial court proceeded to identify the specific conduct of Pastor Cloer and Pastors for Life upon which it entered the civil conspiracy judgment.

The trial court found that Pastor Cloer mailed an epistle to Pastors for Life in which he urged the establishment of a crisis pregnancy center next door to Gynecology Clinic's abortion facility. In the letter, Pastor Cloer explained that the crisis center would serve inner city mothers and their babies and would help to "undercut the 'business' of the abortion mill" next door. Pet. App. at 20a. The trial court also found that Pastor Cloer had used a bullhorn "to coordinate the activities of

the sidewalk counselors gathered" on the sidewalk adjacent to Gynecology Clinic. *Id.*

The basis of Pastors for Life's liability was the conduct of an employee, Richard Cash. Cash, the court found, had stood on the public sidewalk near Gynecology Clinic's driveway holding a picket sign that stated, "Don't Turn In, Keep Going." *Id.* Also, Cash had been identified by witnesses as having stood on the public sidewalk near the driveway in a manner the court found "crowded the clinic driveway" and "blocked the view" of oncoming traffic. *Id.* These facts alone are the basis for the determination of liability for civil conspiracy and for the injunction issued by the court against these Petitioners.

Rather than "examin[ing] critically the basis on which liability was imposed," *Claiborne Hardware Co.*, 458 U.S. at 915, the court below assumed for purposes of decision that these facts alone were the basis for the judgment against the Petitioners *and* that the facts identified by the trial court were instances of constitutionally protected expression. Pet. App. at 2a. The court below could assume these points because, under South Carolina law, liability for a civil conspiracy does not require evidence of unlawful conduct. The court simply failed to address the failure of the trial court to differentiate between the lawful, *constitutionally protected* conduct of the Petitioners and the unlawful or unprotected conduct of others.

Startlingly cavalier, the attitude of the court below toward the evidence and to the requirement of individualized proof of wrong-doing is the antithesis of the critical examination and close scrutiny mandated by this Court where First Amendment freedoms are in jeopardy.

F. The Public Forum Cases

The injunction prohibits Petitioners from demonstrating, picketing or congregating in a buffer zone also created by the injunction. *See* Pet. App. at 11a. That restriction plainly curtails the exercise of the right to free speech, peaceable assembly, and religion. Because the court below failed to subject the injunction to the standards called for by this Court's public forum decisions, it is in conflict with those cases.

This Court has held that sidewalks such as the one at issue here are quintessential traditional public fora. *United States v. Grace*, 461 U.S. 171, 177 (1983). Certainly, the demonstrations and picketing restrained by the injunction are classic forms of free speech. *Boos v. Barry*, 485 U.S. 312 (1988); *Grace*, 461 U.S. at 176-77; *Carlson v. California*, 310 U.S. 106, 112-13 (1940). Consequently, under this Court's public forum cases, the complete prohibition of those two categories of expression, demonstrations and picketing, should have been subjected by the court below to strict scrutiny. *Id.* ("[a]dditional restrictions *such as an absolute prohibition on a particular type of expression* will be upheld only if narrowly drawn to accomplish a compelling governmental interest") (emphasis added). By failing to subject the injunction to even the slightest scrutiny, the court below put itself directly in conflict with this Court's public forum cases.

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE TEXAS SUPREME COURT.

The Supreme Court of South Carolina affirmed the entry of a permanent injunction restraining Petitioners in the exercise of *lawful, constitutionally protected* expression. Pet. App. at 2a. In doing so, the decision below directly conflicts with a decision of the Supreme Court of Texas.

In *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993), the Supreme Court of Texas reversed the judgment of two lower courts enjoining anti-abortion activists from picketing near the home of an abortion provider.[7] In that case, the complaining physician brought suit after his neighborhood became the situs of several anti-abortion picketing events. 853 S.W.2d at 513. At trial, Aquino prevailed only on a count of negligent infliction of emotional distress and failed to obtain a favorable verdict on an invasion of privacy claim. *Id.* The trial court rendered judgment on the jury verdict and entered a permanent injunction against the neighborhood picketing activities of the anti-abortion activists. *Id.* On appeal, the court of appeals overturned a damages award and affirmed the injunction. *Id.*

Texas law does not recognize a cause of action for negligent infliction of emotional distress. *Id.* Consequently, the Texas Supreme Court concluded that the jury verdict and judgment had to be reversed. *Id.* In rendering its judgment, the Texas Supreme Court specifically rejected the argument, made in dissent by Justice Spector, 853 S.W.2d at 522-23, that the permanent injunction could be sustained "without a finding of legal liability . . . ." 853 S.W.2d at 514 n.2. In setting out the basis for its refusal to sustain the injunction, the Texas Supreme Court held, "[n]o final relief, including a permanent injunction, can be granted in a contested case without a determination of legal liability, and the dissenting opinion cites no authority to the contrary." *Id.*

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7. Justice Gonzalez, dissenting, framed the issue in *Valenzuela* as, "whether an otherwise lawful picketing operation may be directed toward a private home." 853 S.W.2d at 514. Ultimately, Justice Gonzalez concludes that it may not, even though the conduct is completely lawful. *Id.* at 516, 519.

Here, the only basis for the determination of the Petitioners' "legal liability" was their *lawful* exercise of *constitutionally protected* rights. Consequently, there exists no valid basis consistent with the First Amendment for the imposition of liability.[8] Concluding to the contrary, and affirming the entry of injunctive relief, the Supreme Court of South Carolina put itself squarely in conflict with the Texas Supreme Court.

This Court should grant the petition in order to resolve the conflict between state courts of last resort on an important question of federal constitutional law.

III. THE PETITION PRESENTS AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT THIS COURT SHOULD RESOLVE.

The Supremacy Clause provides:

> *This Constitution*, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; *and the Judges in every State shall be bound thereby*, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Art. VI, cl. 2 (emphasis added). In direct disobedience to this explicit provision, the Supreme Court of South Carolina has allowed the imposition of civil liability and an injunction for *lawful* conduct protected under "*this*

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8. The Supreme Court of New Jersey also has permitted the imposition of permanent injunctive restraints on anti-abortion picketing activities in the absence of unlawful conduct and in the absence of success on a meritorious claim. *See Murray v. Lawson*, 138 N.J. 206, 649 A.2d 1253 (N.J. 1994).

Constitution."

The Supreme Court of South Carolina affirmed a *state law* civil conspiracy judgment against the Petitioners and the entry of an injunction restricting their *federal constitutional rights*. The court below took these steps while noting that the conduct for which the Petitioners were held liable consisted of *lawful*, *constitutionally protected* acts. Pet. App. at 2a. Even if the State of South Carolina were at liberty to create a cause of action that depends entirely on the commission of *lawful* acts, the Constitution of the United States requires that such a cause of action not cause injury to federal constitutional rights.

The court below failed to subject the *state* claim of civil conspiracy to the *federal* constitution. As direct and inevitable consequence, the judgment below frustrates the operation of the United States Constitution. Such frustration of the operation and purpose of the United States Constitution presents an important and substantial question of federal constitutional law that this Court should address and resolve.

In *Perez v. Campbell*, 402 U.S. 637 (1971), for example, this Court held unconstitutional an Arizona statute suspending the operators' licenses and vehicle registrations for nonpayment of automotive accident liability judgments. The Arizona statute had the effect (but not the purpose) of frustrating federal bankruptcy laws by depriving persons undergoing federal bankruptcy proceedings of their licenses and registrations. 402 U.S. at 644-48. In previous cases interpreting the Supremacy Clause, this Court had allowed "state law [to] frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." 402 U.S. at 651-52.

In *Perez*, however, relying on the Supremacy Clause of the United States Constitution, U.S. CONST. Art. VI, this Court directly and specifically *overruled* those earlier precedents:

> We can no longer adhere to the aberrational doctrine of *Kesler*[*v. Dep't of Public Safety*, 369 U.S. 153 (1962)] and *Reitz*[*v. Mealey*, 314 U.S. 33 (1941)] that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. . . . [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. . . . [W]e conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.

402 U.S. at 651-52.

Here, the "full effectiveness of" the First Amendment rights to free speech, peaceable assembly, and religion are frustrated by the imposition of liability and injunctive restraints based only on the exercise of those rights. The decision below is offensive to the essential principle of the Supremacy Clause of the Constitution. This Court should grant the Petition in order to restore the appropriate relationship between the *federal* Constitution and *state* law.

IV. THE PETITION SHOULD BE GRANTED, THE JUDGMENT BELOW VACATED, AND THE CASE REMANDED FOR FURTHER CONSIDERATION IN LIGHT OF INTERVENING CHANGE IN STATE LAW.

On June 1, 1999, Governor Jim Hodges signed into law an Act of the South Carolina legislature that created a new substantive chapter of the South Carolina Code. That new chapter is entitled, "The South Carolina Religious Freedom Act" ("South Carolina RFA"). *See* Pet. App. at 25a-27a. Pursuant to the South Carolina RFA,

> The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:
>
> (1) in furtherance of a compelling state interest; and
>
> (2)the least restrictive means of furthering that compelling state interest.

Id.

By its terms, the South Carolina RFA is applicable to the litigation filed by Respondent Gynecology Clinic. *See* South Carolina Code §§ 1-32-50 and 1-32-60A, Pet. App. at 26a. The South Carolina RFA was enacted after the decision below by the Supreme Court of South Carolina. Consequently, neither the court below nor the trial court were afforded the opportunity to consider application of the statutory defense it provides to the imposition of civil liability; nor did the Supreme Court of South Carolina or the trial court have the opportunity to consider what limits upon injunctive relief might be required by the imposition of the "compelling government interests/least

restrictive means" test.

The occurrence of intervening events and circumstances warrants the granting of a petition in order to vacate the judgment below and remand the matter for further consideration in light of the changed circumstance or law.[9] One such changed circumstance is the intervening enactment of relevant legislation. *See, e.g., Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981) (Mem.); *Heckler v. Kuehner*, 469 U.S. 977 (1984) (Mem.).

The enactment of the South Carolina RFA serves as a particularly apt basis for the Court to grant the petition, vacating the judgment below and remanding. Under the new statute, the South Carolina courts are required to employ the "compelling government interests/least restrictive means" test. Employment of that mode of analysis will require the court below to apply a more stringent standard of review to the judgment of the trial court and to the terms of the injunction. Pet. App. at 25a-26a.

Granting the petition here, vacating the judgment below, and remanding for further consideration in light of the recent enactment of the South Carolina RFRA may also serve to prevent the unnecessary decision of the federal constitutional questions presented by the decision below. At a minimum, the South Carolina RFA is fairly subject to an interpretation that would render unnecessary the federal constitutional questions presented by this petition. *Cf. Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965).

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9. STERN, GRESSMAN, SHAPIRO, AND GELLER, SUPREME COURT PRACTICE 249-50 (7th ed. 1993).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari to review the judgment of the Supreme Court of South Carolina.

In the alternative, this Court should grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further consideration in light of the newly enacted South Carolina Religious Freedom Act, S.C. Code §§ 1-32-10 *et seq.*

Respectfully submitted,

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Dated: June 14, 1999.

Attorneys for Petitioners

APPENDIX

[Appendix A]

THE STATE OF SOUTH CAROLINA
In the Supreme Court

The Gynecology Clinic, Inc.,
d/b/a Palmetto State Medical Center, Respondent,

v.

Pastor Michael Cloer
and Pastors for Life, Inc., Appellant.

Appeal From Greenville County
Costa M. Pleicones, Circuit Court Judge

Opinion No. 24920.
Heard Feb. 2, 1999 - Decided March 15, 1999

AFFIRMED

Terry Haskins, of Greenville; and James Matthew Henderson, Sr., of The American Center for Law and Justice, of Washington, DC, for appellants.

Suzanne E. Coe, of Law Office of Suzanne E. Coe, of Greenville, for respondent.

PER CURIAM: This is an appeal from an order finding appellants engaged in a civil conspiracy, and enjoining their picketing activities directed towards respondent, an abortion services provider. We affirm.

Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy. Under South Carolina law, "lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another.'" *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988). The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy. *LaMotte v. Punch Line of Columbia, Inc., supra.*

Appellants next contend that respondent did not prove a conspiracy because respondent did not show special damages. An action for civil conspiracy is an action at law, and the trial judge's findings will be upheld on appeal unless they are without evidentiary support. *Future Group II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996). In a conspiracy action, what is required is proof of the fact of damages, not certainty of amount. *Charles v. Texas Co.*, 199 S.C. 156, 18 S.E.2d 719 (1942). "The elements which go to make up such damages must depend on the nature of the act and the injury." *Id.* Appellants' own literature, which claims to have damaged respondent by causing a dramatic drop in the number of abortions performed at the clinic, is itself evidence of damages. We affirm the trial judge's damages findings. *Future Group II v. Nationsbank, supra.*

Finally, appellants raise numerous evidentiary challenges to the findings of the trial judge which form the basis for the injunctive relief granted respondent. We find no evidentiary or constitutional error in the injunction issued here. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117

S.Ct. 855, 137 L.Ed. 1 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S.Ct. 2516, 129 L.Ed.2d 593 (1994). Accordingly, the order appealed from is

AFFIRMED.

[Appendix B]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff,	)	Case Number: 94-CP-23-2286
-vs-	)	ORDER GRANTING TEMPORARY RESTRAINING ORDER
Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	

This matter came before me on motion of Plaintiff for Temporary Restraining Order pending a hearing on August 18, 1994 for a Temporary Injunction. The verified complaint filed by the Plaintiff states that Plaintiff is a medical provider which provides abortion services on Laurens Road. Plaintiff alleges that the Defendants named have either participated in, encourage, aided or otherwise assisted repeated demonstrations at Plaintiff's establishment. The Plaintiff has further alleged that the Defendants have used methods including using bullhorns to disturb the activities inside the clinic, approaching and stopping traffic either seeking egress or ingress into the clinic, attempting to either counsel persons in the car or hand

them literature, lining the sidewalks around the clinic in such a manner that clearly prevents safe egress from the premises in that the cars cannot see oncoming traffic on Laurens Road, and continually standing in the driveway of the clinic, creating a danger and nuisance for all clients seeking access.

Plaintiffs have alleged in their request for a temporary injunction/restraining order that irreparable harm will occur should the Defendants be allowed to continue such conduct and have delineated specific harm damaged claimed in their complaint.

Based upon the above verified complaint and supporting affidavit(s), I hereby order the above defendants are temporarily restrained from:

1. Approaching and stopping traffic either seeking egress or ingress to Palmetto State Medical Center;

2. Attempting to either "counsel" persons in any car or hand any person in a car literature;

3. Lining the sidewalks around Palmetto State Medical Center in such a manner which clearly prevents safe egress from the premise and preventing view of oncoming traffic;

4. Standing or walking across the driveway of the above clinic;

5. Using bullhorns or any other noise making device, including any excessive noise making, within a hundred and fifty feet of the property line;

6. Additionally, in consideration of the allegations contained in the verified complaint, the supporting affidavit for this motion only, and the fear of the circumstances surrounding

Plaintiff's clinic, I hereby order a buffer zone of twenty feet upon which all Defendants are ordered to remove themselves. This buffer zone of twenty feet shall run from all actual parts of the clinic building or clinic entrance fence, which is directly attached to the building. Additionally, this buffer zone shall run twenty feet on either side of the clinic driveway. The Court recognizes the difficulties involved in that the adjoining property is allegedly owned by several Defendants. Apparently, the premises share a common driveway, which has caused difficulty in the past. Based upon the complaint and the allegations alleged, I hereby order the Defendants to cease and desist from coming or standing within twenty feet of the Plaintiffs side of the driveway, accepting the normal egress and ingress of automobiles pulling into the premise of Piedmont Women's Center.

Any violations of the above may be considered contempt of court and punished accordingly.

IT IS SO ORDERED

[signature omitted]

Presiding Court Judge
Thirteenth Judicial Circuit

Greenville, SC
August 12, 1994

[Clerk's certification stamp omitted]

[Appendix C]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff,	)	Case Number: 94-CP-23-2286
-vs-	)	ORDER
Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	

This Order is a modification of a Temporary Restraining Order issued by this Court on August 12, 1994, and shall be in effect until the hearing before this Court for a Permanent Injunction. It is based on the allegations of the Plaintiff contained in affidavits and other supporting documents presented to this Court when the August 12th Temporary Restraining Order was issued.

Through this order, this Court intends to protect a woman's freedom to seek medical or counseling services in connection with her pregnancy. Additionally, this Court intends to protect the First Amendment free speech rights and property rights of *all* citizens. As with the previous Order, the provisions of this

Order are intended to burden no more speech than necessary to serve significant government interests. The Plaintiff shall post a $500.00 bond.

IT IS ORDERED, that the above individually-named defendants and any person acting in concert with them are restrained from the following:

1. As all times and on all days, from trespassing on the private property of the Palmetto State Medical Center, including its driveway and parking lot.

2. At all times on all days, from interfering with the unfettered ingress to and egress from the Palmetto State Medical Center building and its parking lot.

3. At all times and on all days, from interfering with the free flow of traffic on the property of the Palmetto State Medical Center and on the Public streets and sidewalks of Greenville County. A parked vehicle or a person not on the private property of the Palmetto State Medical Center may be approached only as long as the contact is strictly peaceful and does not include the exchange of fighting words or threats. However, any vehicle containing a physician employed by the Palmetto State Medical Center or the physician may not be approached.

4. At all times on all days, from picketing, demonstrating, or in any way congregating on the public sidewalk twelve feet on either side of the driveway of the Palmetto State Medical Center. This area shall constitute a buffer zone. As a general rule, this area encompasses the space between the white lines painted on the sidewalk. One may walk across this area of the sidewalk only as necessary to reach an unrestricted location.

5. At all times on all days, from obstructing the view of street traffic by any vehicle that is attempting to exit the Palmetto State Medical Center, in order to allow the safe egress of traffic onto Laurens Road, a busy city street.

6. During the hours that the clinic is in operation and accepts patients, from making any noise, including the use of any bullhorn or loudspeaker, that would be heard by a person or ordinary hearing inside the walls of the Palmetto State Medical Center.

Any violation of this Order may be considered contempt of court and may be punished accordingly, including by fine or imprisonment or both.

IT IS SO ORDERED.

August 19, 1994 /s/

Larry R. Patterson
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina

[Clerk's Certification Stamp Omitted]

[Appendix D]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff,	)	Case Number: 94-CP-23-2286
-vs-	)	ORDER
Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	

This matter came before me for trial on October 15, 1996. Plaintiff alleged that the Defendants' conduct constituted a private nuisance and/or a civil conspiracy and sought a permanent injunction. On August 19, 1994, The Honorable Larry R. Patterson entered an order[1] enjoining the Defendants from engaging in certain activities. That Order provided, with

1. The August 19, 1994 order continued in effect the provisions of a temporary restraining order issued on August 12, 1994. A preliminary hearing on the merits was held on September 7, 1994. After that hearing, the only modification of the August 19, 1994 order was an oral one, which excluded the Piedmont Women's Center from its operation.

regard to Defendants, that they were enjoined:

1. At all times and on all days, from trespassing on the private property of Palmetto State Medical Center, including its driveway and parking lot.

2. At all times and on all days, from interfering with the unfettered ingress to and egress from the Palmetto State Medical Center building and its parking lot.

3. At all times and on all days, from interfering with the free flow of traffic on the property of the Palmetto State Medical Center and the public streets and sidewalks of Greenville County. A parked vehicle or a person not on private property of the Palmetto State Medical Center may be approached only so long as the contact is strictly peaceful and does not include the exchange of fighting words or threats. However, any vehicle containing a physician employed by Palmetto State Medical Center or the physician may not be approached.

4. At all times and on all days, from picketing, demonstrating, or in any way congregating on the public sidewalk twelve feet on either side of the driveway of the Palmetto State Medical Center. This area is to constitute a buffer zone. As a general rule this encompassed the space between the while lines painted on the sidewalk. One may walk across this area of the sidewalk only as necessary to reach an unrestricted location.

5. At all times and on all days, from obstructing the view of street traffic by any vehicle that is attempting to exit the Palmetto State Medical Center or to allow the safe egress of traffic onto Laurens, Road, a busy city street.

6. During the hours the clinic is in operation and accepts patients, from making any noise, including the use of any bullhorn or loudspeaker, that would be heard by a person of ordinary hearing inside the walls of the Palmetto State Medical Center.

This case is emotionally highly-charged and the parties have from time to time strayed off course and sought to frame it as one involving the right to have an abortion. This Court is neither asked in pleadings, nor does it purport in this Order to sort out the legal and moral issues surrounding abortion. Notwithstanding the Defendants' well-take points of view concerning the sanctity of human life, abortion is constitutionally protected and is not the issue here.

The real issue is whether, and to what extent, Defendant's conduct may be restrained in order to protect the lawful operation of Plaintiff's business, while at the same time insuring that Defendants' First Amendment rights are not unduly infringed.

Toward that end, I have determined that the parties, while attempting at trial to justify and promote their respective moral and/or legal stances with regard to abortion, have each -- perhaps unintentionally -- demonstrated that the temporary injunction has, for nearly three years, fairly delineated the battlefield upon which they wage their conflict. The generally peaceful period during which the temporary injunction has been in effect bears testament to its efficacy.

Notwithstanding that observation, I must first decide whether Plaintiff has borne its burden of proof as to either of its causes of action even before reaching the issue of entitlement to injunctive relief. Having reviewed the extensive record and the

numerous exhibits submitted on behalf of all parties, I have concluded that as to its cause of action for private nuisance, Plaintiff has not borne that burden.

Under the law of South Carolina, such a cause of action may only be properly directed toward a defendant who owns land adjoining, or in close proximity to the property of a plaintiff. *See Winget v. Winn-Dixie Stores, Inc.*, 242 S.C. 52, 130 S.E.2d 363 (1963); *Doremus v. Atlantic Coast Line R.R.*, 242 S.C. 123, 130 S.E.2d 370 (1963); *Bowlin v. George*, 239 S.C. 429 123 S.E.2d 528 (1962); *Deason v. Souther Ry.*, 142 S.C. 328, 140 S.E. 575 (1972); F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS 165 (1990); 58 Am Jur 2d *Nuisances* § 1 (1971). Thus, in this case the individual Defendants could not, under any set of circumstances, be found liable for a private nuisance because they are not the owners of any land allegedly used for some wrongful act that proximately cause the Plaintiff some injury.

The remaining Defendants avoid liability on the nuisance theory because the record is devoid of any evidence that their *land* was used for some wrongful purpose. Plaintiff has posited the theory that merely providing a gathering place for those who violate the law by unlawfully venturing onto the adjacent property sustains an action for private nuisance. I disagree. The law of South Carolina does not provide redress to Plaintiff for the Defendants' activities in this case under this particular rationale. While Plaintiff has suffered an unreasonable interference with the use and enjoyment of its land, such interference was occasioned by the conduct of the Defendants separate and apart from any nexus they may have had with the land owned by Pastors for Life.

On the other hand, as to Plaintiff's cause of action of civil conspiracy, there is no question but that the Defendants have conspired with the intent to injure the Plaintiff and that they have caused special damage to the Plaintiff in the form of a decrease in Clientele. *Lee v. Chesterfield Gen'l Hosp.* 289 S.C. 6, 344 S.E. 2d 379 (Ct. App. 1986). It is abundantly clear to this court that the Defendants have both conspired and interfered with the lawful operation of Plaintiff's business by blocking access thereto. Pastor Michael Cloer admitted as much in both his affidavit and in this testimony before me. Video tapes of activities conducted at the clinic at varying points in time reveal a pattern of behavior by the other individual defendants acting in concert with members of Pastors for Life by utilizing the property it controls as a staging point for their protests. The only Defendant that escapes culpability on the record before me is the Piedmont Women's Center. As Judge Patterson noted at the September 7, 1994 hearing, there is scant evidence to suggest that this entity promotes or participates in the activities which are the subject of this litigation.

While the other Defendants would certainly deny that their conduct amounts to a "conspiracy" in a formal sense, the circumstantial evidence of coordinated and cooperative efforts toward the shared goal of stopping the practice of abortion at the clinic admits of but one conclusion. The Defendants' expression of bonhommie toward the clinic in its provision of non-abortion-related services fly in the face of their universal desire to see and end to the provision of abortion services at the Laurens Road location.

Moreover, testimony from several witnesses at both the October, 1996 hearing and the September 7, 1994 hearing

before Judge Patterson indicates that the Gynecology Clinic has suffered damages in the form of decreased clientele or interrupted business. On several occasions, Plaintiff has had to resort to law enforcement to maintain access to its property. Witnesses testified that in certain instances they had seen cars diverted from Plaintiff's driveway. Otherwise noted that patronage of Plaintiff's business has declined over time as a result of the Defendants' activities.

I find that this damage flows from the Defendants' *means* of conveying their message. as opposed to its subject matter. Doubtless, few of the women who find themselves in the circumstance of paying a visit to the clinic are receptive to the Defendants' entreaties at least initially. The law is nonetheless clear that there is no right to freedom from unwanted or repugnant speech. Be that as it may, the testimony from patrons, volunteers, and employees of the clinic paints a clear picture of repeated episodes of intimidation, harassment, crowding or blocking of access to clinic property on the part of the Defendants,

Having so found, the only remaining questions before this court concern the appropriate remedy. Plaintiff had initially sought money damages in addition to injunctive relief, but it abandoned its prayer for damages at trial, requesting only a permanent injunction at least as restrictive as the temporary injunction issued by Judge Patterson. Because the Defendants' constitutional right to free speech is implicated by these facts, I must ascertain whether such an injunction is an unreasonable restriction thereon.

While the Defendants may assert that they should be able to exercise their First Amendment rights unfettered, our

constitutional law has long recognized that reasonable time, place, and manner restrictions on speed do not result in an unconstitutional deprivation of freedom. The test is whether restrictions on speech are: (1) content neutral; (ii) narrowly tailored to serve a significant government interest, and (iii) leave open ample alternative channels for communication of the information. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Where an injunction is the vehicle for the speech restriction, the test becomes "whether the challenged provision of the injunction burden no more speech than necessary to serve a significant governmental interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765 (1994). The *Madsen* test applies here.

In the interim between the hearing on this matter and the entry of this order, the United States Supreme Court rendered its latest opinion with respect to the subject matter of the case. In *Schenck v. Pro Choice Network of Western New York*, Op. No. 95-1065 (February 19, 1997), the Court found an order which created a "fixed buffer zone" much like the one created here was constitutional. *Schenck* is particularly instructive because the injunction under review in the case was significantly more restrictive than the one in place here. I find that identical governmental interest exist in both *Schenck* and in this case, to wit: ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting the freedom to lawfully obtain abortion services. The fact that Judge Patterson's order effects fewer constraints on Defendants' First Amendment freedom than did the *Schenck* injunction indicates to me that it is well-tailored to the outer limits of Defendants' conduct. There is a marked difference between the *Schenck* Defendants' apparent

penchant for violence and the conduct of the present Defendants, which might be best characterized as zealous.

In short, I find no reason why the present temporary injunction should not be made permanent. As written, Judge Patterson's Order reasonable delineates the parties' rights and obligations without unnecessarily restricting Defendants' right to free speech. The injunction merely assures safe access to the clinic and a tranquil environment inside it. Notwithstanding the Plaintiffs' demand for a more restrictive injunction as well as the Defendants' disingenuous contention that the present Order is unclear and leaves them confused as to how to comely with its proscriptions, I decline to alter it substantively. The wording of the temporary injunction is not mysterious or vague. Rather, it sets forth minimal restraints upon the Defendants so as to accomplish an uncomplicated and legally correct result that is fair to all the parties.

It is therefore ORDERED that the temporary injunction issued on August 19, 1994, as orally modified on September 7, 1994, be made permanent.

SO ORDERED.

/s/
Costa M. Pleicones
Presiding Judge

May 12, 1997
Columbia, SC

[Clerk's Certification Stamp Omitted]

[Appendix E]

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE

The Gynecology Clinic, Inc. doing business as Palmetto State Medical Center, Plaintiff, -vs- Ruth Trippi, Betty Walsh, Piedmont Women's Center, Michael Cloer, Pastors for Life, and unknown defendant persons protesting at Plaintiff's premises Defendant.	)	Case Number: 94-CP-23-2286 ORDER

On May 29, 1997, counsel for Defendants Cloer and Pastors for Life, Inc. filed a motion under Rules 52(b) and 59 of the South Carolina Rules of Civil Procedures seeking to have me alter and/or amend the order I issued on May 12, 1997. After reviewing the motion and Plaintiff's return thereto, I find that oral argument would not be of assistance to the court.

Counsel for these Defendants raises three grounds for alteration and/or amendment of the May 12 order, none of which has merit. The first ground alleges that I failed to rule explicitly upon the Defendants' second, seventh, and ninth affirmative defenses. The second defense, in which the Defendants asserted that Plaintiffs' claims were barred by the

statute of limitations, was not raised or argued at trial and was deemed to have been abandoned. Even had I addressed this defense specifically, the actions of Pastor Cloer and Pastors for Life which created the predicate for my order occurred well-within the applicable limitations period. S.C. Code Ann. § 15-3-535 (Supp. 1996)

The seventh and ninth defenses assert that the Defendants actions art protected by the United States and South Carolina constitutions, respectively. My order implicitly rejected both defenses under the *Madsen v. Women's Health Center*, Inc.[2] and *Schenck* v. Pro Choice Network of Western New York[3] rationale, as will be further explained herein.

As their second ground, Defendants allege that the May 12, 1997 order does not comply with the requirements of Rule 52(a) of the SCRCivP. Specifically, they assert that the order fails to set forth findings of fact and conclusions of law with the requisite particularity. As an initial matter, I would commend the Defendants' attention to the case of *Noisette v. Ismail*, 304 S.C. 56, 403 S.E.2d 122 (1991), which states that the requirement of Rule 52(a) is merely directory. Nonetheless, the Defendant's motion is well-taken in that the May 12, 1997 order perhaps lumps all of the Defendants together too readily.

That said, I will briefly revisit the acts of Pastors for Life, Inc. and Pastor Michael Cloer as they relate to Plaintiff's cause of action for civil conspiracy. To be liable under this theory, there must be (1) a combination of two or more person, (2) for the purpose of injuring the plaintiffs, (3) which causes him special

2. 512 U.S. 753 (1994)

3. Op. No. 95-1065 (February 19, 1997).

damage. *Charles v. Texas Co.*, 192 S. C. 82, 5 S.E.2d 464 (1939). As further explained in *Lee v. Chesterfield Hospital*, 289 S.C. 6, 10-11, 344 S.E.2d 379, 381-82 (Ct. App. 1986),

> The gravamen of the tort is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se. A civil conspiracy may, of course, be furthered by an unlawful act. However, conspiracy may lie even thought no unlawful means are used and no independently an unlawful act is not a necessary element of the tort. An action for unlawful acts are committed. (Citations omitted).

In many instances, proof of the conspiracy must be accomplished by circumstantial evidence. *See, e.g., Island Car Wash, Inc. V. Norris*, 292 S.C. 595, 358 S.E.2d 150 (1987). Here, however, the conspiracy is apparent from the Defendant's own statement. Aside from the testimony at trial which was mentioned in the earlier order, several exhibits submitted by the Defendants in briefs to the court plainly show there intent to injure the Plaintiff. Exhibit 4 to the June 6, 1996 affidavit of Richard Cash is a letter dated May 24, 1993 from Michael Cloer to Pastors for Life, Inc. which is particularly telling:

> It would be difficult to overstate the importance of locating a CPC [presumably a "crisis pregnancy center"] next door to the abortion mill. Not only will the CPC provide a much needed service to mothers and babies in the inner city,, but in so doing it will undercut the "business" of the abortion mill, and thereby play a key role in closing it down.

Another equally probative exhibit is a videotape dated September 3, 1994 which shows Richard Cash, an employee of Pastors for Life, Inc., standing at the end of the clinic driveway with a sign which reads "Don't turn in, Keep Going."

These two pieces of evidence clearly bespeak an intention shared by Michael Cloer individually and Pastors for Life, Inc. collectively to injure the business of the Plaintiff. I would note for the sake of clarity, especially in light of Defendants' seventh and ninth defenses, that their speech is not directed toward the goal of ending abortion *generally*, but rather toward the specific purpose of decreasing the business at *this* clinic. As such, it is not protected under a First Amendment rationale. *See Madsen, supra; Schenck, supra.*

Under my reading of the case law, Pastor Cloer and Pastors for Life, Inc. could be found liable even if there were no evidence that they acted illegally to carry out their intention. The action would lie only upon the showing of some overt act in furtherance of the conspiracy by either of these Defendants or other co-conspirators. In point of fact, others, including Ruth Trippi and Betty Walsh with whom these defendants acted in concert, repeatedly engaged in overt acts, many of which were illegal (ie. crowding and blocking the clinic driveway).

As the court stated in *Lee v. Chesterfield Hospital*, 289 S.C. 6, 344 S.E. 2d 379 (Ct. App. 1986), the focus of the inquiry is on the damages incurred by the Plaintiff. In addition to the evidence of damages mentioned in the earlier order, there is also evidence in the form of a letter from Michael Cloer dated March 3, 1993 [Exhibit 2 to the affidavit to Richard Cash dated June 6, 1996] wherein figures from 1988 to 1992 show a decreasing number of abortions at Palmetto State. Although I have no reason to believe that these figures are accurate, it can hardly be said that the issue of damages is contested by the defendants. Moreover, there is evidence of overt acts on the part of Pastor Cloer and Pastors for Life, Inc. to sustain the claim for civil conspiracy over and above the acts of their co-conspirators. As stated at trail and in his affidavit, Pastor Cloer

admits to using a bullhorn to coordinate the activities of the sidewalk counselors gathered in front of the clinic. I find this activity was also a means of disrupting the Plaintiffs' business by disturbing the clinic's patients, and that it had the desired effect, as recounted by Ricki Riddle at the September 7, 1994 hearing. Richard Cash was likewise identified by Candy Kern and Elizabeth O'Connor at the same hearing as having crowed the clinic driveway and having blocked the view of Laurens Road. Because of these factual findings, I must conclude that Plaintiff has proved its entitlement to relief under its civil conspiracy cause of action against both Pastor Cloer and Pastors for Life, Inc.

Lastly, the Defendants maintain that my application of the rationale adopted by the United States Supreme Court in the *Madsen* and *Schenck* decisions is erroneous. It would seem from nature of the Defendants' argument that they would have the *Madsen* and *Schenck* cases limited to their respective factual scenarios-- and approach I feel is unwarranted and is against the clear intent of the Court. This case is factually similar in some respects to those which have preceded it, but is by no means a carbon copy of them. Neither is the relief granted here a mere duplication of what has been deemed constitutional in other contexts. Rather, the injunction speaks to the particular facts of this case-- the physical layout of the site, the intent and conduct of the Defendants, and the damages incurred by the Plaintiff. When viewed in the proper context, and from a neutral perspective, the prohibitions of the May 12, 1997 order follow *Madsen* and *Schenck* and achieve the narrowly-tailored relief envisioned by those decisions. The relief granted heretofore was most narrowly tailored so as not to impinge upon any constitutionally protected activity carried on by the Defendants.

Defendants' motion to alter or amend is therefore DENIED.

/s/
Costa M. Pleicones
Presiding Judge

July 15, 1997
Columbia, SC

[Clerk's Certification Stamp Omitted]

[Appendix F]

[The Supremacy Clause states:]

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. Art. VI, cl. 2.

[The First Amendment states:]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I.

[The Fourteenth Amendment, in pertinent part, states:]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[The South Carolina Religious Freedom Act, in pertinent part, states:]

Section 1-32-10. This chapter may be cited as the 'South Carolina Religious Freedom Act'.

Section 1-32-20. In this chapter:

(1) 'Demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(2) 'Exercise of religion' means the exercise of religion under the First Amendment to the United States Constitution or Article I, Section 2 of the State Constitution.

(3) 'Person' includes, but is not limited to, an individual, corporation, firm, partnership, association, or organization.

(4) 'State' means the State of South Carolina and any political subdivision of the State and includes a branch, department, agency, board, commission, instrumentality, entity, or officer, employee, official of the State or a political subdivision of the State, or any other person acting under color of law.

Section 1-32-30. The purposes of this chapter are to:

(1) restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling state interest will be imposed on all state and local laws and ordinances in all cases in which the free exercise of religion is substantially burdened; and

(2) provide a claim or defense to persons whose exercise of religion is substantially burdened by the State.

Section 1-32-40. The State may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless the State demonstrates that application of the burden to the person is:

(1) in furtherance of a compelling state interest; and

(2) the least restrictive means of furthering that compelling state interest.

Section 1-32-45. This chapter does not affect the application of and must be applied in conjunction with Chapter 27 of Title 24, concerning inmate litigation.

Section 1-32-50. If a person's exercise of religion has been burdened in violation of this chapter, the person may assert the violation as a claim or defense in a judicial proceeding. If the person prevails in such a proceeding, the court shall award attorney's fees and costs.

Section 1-32-60. (A) This chapter applies to all state and local laws and ordinances and the implementation of those laws and ordinances, whether statutory or otherwise, and whether adopted before or after the effective date of this act.

(B) Nothing in this chapter may be construed to authorize the State to burden any religious belief.

(C) Nothing in this chapter may be construed to affect, interpret, or in any way address:

(1) that portion of the First Amendment of the United

States Constitution prohibiting laws respecting the establishment of religion;

(2) that portion of Article I, Section 2 of the State Constitution prohibiting laws respecting the establishment of religion.

(D) Granting state funding, benefits, or exemptions, to the extent permissible under the constitutional provisions enumerated in subsection (C)(1) and (2), does not constitute a violation of this chapter.

As used in this subsection, 'granting', with respect to state funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(2)

No. 98-2006

In The

Supreme Court of the United States

**PASTOR MICHAEL CLOER;
PASTORS FOR LIFE, INC.,**

Petitioners,

v.

**THE GYNECOLOGY CLINIC, INC., d/b/a
PALMETTO STATE MEDICAL CENTER,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE SOUTH CAROLINA
SUPREME COURT**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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1988

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STATEMENT OF THE CASE

Introductory Facts

Gynecologic Clinic, Inc., which is known as "Palmetto State Medical Center" (Palmetto State) is a medical facility, which performs OB/GYN, services, as well as clinical abortions. It is undisputed that it is located on an extremely busy street—Laurens Road in Greenville. Appellants object to the provision of abortion and engage in activities to stop the provision of abortion.

In their Petition for Writ of Certiorari, Petitioners asserted that the South Carolina Courts lightly imposed injunctive relief to stop the "lawful conduct" of protesters holding picket signs and crowding the clinic driveway. They recklessly assert that the South Carolina Supreme Court did not examine the basis for imposing the injunction (App. Brief p. 21). However, the facts are different than presented by Petitioner—so much so that the South Carolina Supreme Court unanimously affirmed the injunction.

Appellant Cloer is a pastor in Greenville who is a leader of "Pastors for Life". He has admitted to trespassing on the clinic property in the past—and even blockading the doors (R. p. 234, Lines 13-24). Cloer admitted that his goal was to close down the clinic (R. p. 235, lines 4-6). He has admitted to using a bullhorn to preach and lead crowds outside the clinic (R. p. 232, lines 1-3) and that the bullhorn can emit excessive noise (R. p. 234, lines 9-12). Cloer admits that the road in front of the clinic is "dangerous" (R. p. 230, line 18).

Cloer is currently the "National Director" for co-Appellant, Pastors for Life, and was their former "Local Director" (R. p. 226, line 9-12). Pastors for Life is the owner of property next door to the clinic. While Cloer, as "Director" for Pastors for Life, acknowledged a duty to mitigate safety hazards (R. p. 230, lines 11-15) and acknowledged that the organization could set rules for

people to protest the clinic (R. p. 230, lines 2-10), it has no such rules or safeguards (R. p. 230 lines 18-20). Cloer admits to being "on notice" of severe ingress/egress problems at the clinic, due to the protesters blocking vision, for approximately three years (R. p. 233, lines 2-8).

It is undisputed that Pastors for Life owns the lot next door to the clinic and has allowed the lot to be used as a "base" for anti-abortion activities. Cloer stated it was his "intent that by providing a base where protesters and counselors could operate you could slowly effect the status of the clinic" (R. p. 236, lines 21-24). Cloer has been arrested 5 or 6 times regarding protesting abortion, including being arrested for blockading the clinic in 1989. Two other members of Pastors for Life's Board have also been arrested for blockading the doors of Greenville abortion providers (R. p. 240, lines 6-15). Cloer admits that he, on behalf of Pastors for Life, has a calendar and coordinates which protesters show up (R. p. 241, lines 13-18). When co-Defendant (in the State Circuit case) Ruth Trippi and another protester were jailed by the Honorable Larry Patterson for willfully violating the temporary injunction in this case, Cloer hailed them as "heroes" . Much testimony presented at all the hearings concerned an individual named Richard Cash. Cash is employed by Pastors for Life, by Cloer's recommendation (R. p. 226, lines 23-24). He has participated in approximately 20 "rescues", including the prior one at Palmetto State (R. p. 214, lines 7-23). He admits to helping "organize and lead" the 1992 "rescue" at Palmetto State (R. p. 215, lines 6-20). Cash readily acknowledges that his goal is to stop abortion, which includes blockading doors (R. p. 217, lines 11-12). Cash is at the clinic basically from its opening hour to its close (R. p. 218, lines 14-17). Cash has been arrested fifteen or twenty times—so many, he cannot remember the number of his arrests (R. p. 224, lines 13-15, R. p. 225, line 7). All were for abortion activity.

Facts regarding impeding ingress/egress of traffic

At the September 7, 1994 hearing, Officer Jefferson of the Greenville City Police Department testified regarding driving his car through the clinic driveway (which shares a driveway with Pastors for Life's property). The Officer testified that he observed drivers going out of the clinic were unable to see the traffic flow they were entering, due to protesters and their signs obstructing the view. In fact, the Officer testified that he could not see more than five steps from his car due to visual obstruction by the protesters. Richard Metcalf, a former security guard for the clinic, testified that he observed Cash and other protesters standing in front of vehicles—where the drivers were unable to see either way when trying to enter the flow of traffic. He further testified that they put their signs and arms in front of the windshields of cars leaving the clinic. Similarly, Elizabeth O'Conner testified that, when exiting the clinic, she could not see the flow of traffic due to the protesters on both sides of the driveway. (R. p. 272-275 R. p. 281-282, and R. p. 285-294). Even a former patient testified that after her operation, when she tried to exit the clinic driveway onto Laurens Road, she could not see oncoming traffic—because Richard Cash (of Pastors for Life) and another protester were holding big signs blocking her vision (R. p. 243-246). She testified that her mother (the actual driver) had to "blindly" pull out and just hope an accident did not result (R. p. 245, lines 22-24).

According to the security guard for the clinic, "There's usually protesters on both sides of the driveway. Depending on, well, the layout of this property itself, either way it's an impairment to vision" (R. p. 169, lines 13-16).

It is undisputed that there are safety concerns due to the flow of traffic on this busy street and the Petitioners do not even challenge the factual findings regarding the substantial blockage of vision and egress/ingress. Instead,

they seem to feel they have a constitutional right to put others in danger.

Facts regarding Excessive Noise and Noise Amplification

At the September 7, 1994 hearing, Ricki Riddle, former Manager of Palmetto State, testified that while inside the clinic she could hear loud chanting and preaching—which was clearly audible (R. p. 082-083). Ricki also heard bullhorns used outside and had to turn up the radio inside to drown the noise created from the protesters. Richard Metcalf testified that he had personally seen Trippi and Cash yelling into the window area in front of the clinic. His pleas to stop the noise were ignored. Metcalf has seen Trippi with the bullhorn (R. p. 089). Richard Fuller and Elizabeth O'Connor (R. p. 121) testified to seeing Appellant Cloer with the bullhorn (R. p. 099). Kern testified to seeing Cloer with the bullhorn to engage the protesters in loud chanting and singing (R. p. 103-105).

Facts Regarding Harassment and Threats

At the September 7, 1994 hearing, Richard Metcalf testified that Trippi told him "we have assault rifles and it's perfectly legal to have them" (R. p. 091-092). Kern testified that, following the well-publicized shooting of a doctor from a clinic in Pensacola, Florida, by a protester, Trippi was standing on the building owned by Pastor's for Life and yelled at her "you're next" (R. p. 112). She also testified to being threatened by Cash (R. p. 117). Curtis Hinkle (a volunteer escort) testified that two protesters cornered him with his back against the wall the clinic. Because he did not want to provoke an altercation, he stayed pinned there—subjected to continuous lecturing and readings from the protesters (R. p. 126). Neal McFarland testified to co-Defendants Trippi and Walsh—with Cash (employee of

Pastors for Life)—harassing patients coming on to the facility in a manner which could only be construed as abusive and harassing (R. p. 407-C) and of co-Defendant Trippi striking an escort with a protest sign (R. p. 412).

McFarland testified to hearing Cash approach Kim Chamness, an employee and say "What's the matter, are you afraid you'll get shot?" (R. p. 179, lines 21-22).

This is not only an emotional situation, but also a potentially dangerous one. The clinic only requested reasonable safeguards for its employees and patients.

The Injunctive Relief Granted

The terms of the injunction were narrowly drawn to simply address the evidence presented and the finding of civil conspiracy. The Petitioners now cannot trespass on the clinic property and stand in the clinic driveway (which they have no colorable right to do anyway). They were also ordered to stay 12' from the driveway, which the Court concluded from the evidence presented would be the minimal distance to ensure that drivers could see oncoming traffic to exit the clinic and cars could safely pull in from Laurens road. The Petitioners also now cannot use their bullhorns, loudspeakers or by screaming which can be heard inside the clinic by someone of ordinary hearing.

ARGUMENT

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED. THERE IS NO CONFLICT WITH PRECEDENT FROM THIS COURT OR APPLICABLE CONFLICTS WITH OTHER STATE HIGH COURTS.

There is no conflict with the Texas Supreme Court

The Petitioners assert that the case *sub judice* is in direct conflict with the Supreme Court of Texas in Valenquela v. Aquino, 853 S.W. 2d 512 (Tex. 1993). In Valenquela, Dr. Aquino obtained a jury verdict against protesters picketing his residence on the sole theory of negligent infliction of emotional distress. The Court also awarded damages and imposed a 400' buffer zone around Aquino's home. However, since Texas has never recognized the theory negligent infliction of emotional distress, the case was reversed.

However, Aquino also sued for invasion of privacy—and the Court's opinion is not clear whether this theory was simply not charged or whether it was dismissed. The Texas Supreme Court remanded the case back to trial on the privacy issue. The Court made no ruling about the effect, if any, law protecting privacy interests would have on concurrent law protecting civil rights. Indeed, they stated "Absent findings or evidence to establish Valenquela's liability to Aquino, we decline to debate the very important and difficult but nevertheless hypothetical issue of whether Valenzuela's constitutional rights might provide a shield from such liability if it were ever established" Aquino at 853 S.W.2d 513.

It is puzzling why the Petitioners believe that South Carolina's law on civil conspiracy has anything to do with

Texas' decision not to recognize negligent infliction of emotional distress—in any circumstance—as a viable legal theory. Any "conflict" the Aquino case has with the one *sub judice* is far-fetched at best.

SOUTH CAROLINA'S RULING IS CONSISTENT WITH THE PRECEDENT ESTABLISHED BY THIS COURT.

Petitioners also assert that South Carolina trampled on five cases earlier decided by this Court. Petitioners seem not to notice that South Carolina used these very cases in making its ruling and tailored the injunctive relief specifically by the guidelines established by this Court.

The United State Supreme Court's decision in Madsen v. Women's Health Center, 512 U.S. 1277, 114 S.Ct. 2516, reh'g denied, 115 S.Ct. 23 (1994), provides the proper standard for evaluating whether an injunction regulating activity around a reproductive health center facility violates the First Amendment to the United States Constitution. In that case, the Court upheld provisions of an injunction establishing a 36-foot buffer zone around the entrances and driveway of a reproductive health care clinic and imposing certain noise restrictions around the clinic. The Court held that an injunction passes Constitutional muster even if its has the effect of limiting expressive activity in and around a medical facility if it is (1) content neutral, id. at 2523; (2) serves a significant government interest, id.; and (3) burdens no more speech than necessary to protect that interest, id. See also Pro-Choice Network v. Schenck, 67 F.3d 377, 386 (2nd Cir. 1995) in banc, cert. granted, 116 S.Ct. 1260 (1996)(applying Madsen analysis to uphold injunction creating fifteen-foot buffer zone around clinic entrances and fifteen-foot bubble zones around individuals and cars approaching and leaving clinics); Planned Parenthood Shasta Diablo, Inc. v. Williams, 898 P.2d 402, 402 (Cal. 1995, pet. for cert. filed, Oct. 10, 1995 (applying Madsen to

uphold 60-foot buffer zone). As the California Supreme Court stated, "Madsen conclusively affirmed the principle which many lower courts – including our own – had previously endorsed, that a narrowly drawn 'buffer zone' around a family planning clinic may be justified if it advances significant state interests." Williams, 898 P.2d at 409. Madsen is quoted and applied throughout the Orders issued by both the Trial Judge and the South Carolina Supreme Court.

The Court's Order is Content-Neutral.

The Court's Order of July 15, 1997 is clearly content-neutral. It singles out no specific message. It only regulates the conduct of defendants, and makes no reference to the content of their speech. Courts have consistently found injunctions that govern the conduct of individuals around reproductive health care facilities to be content-neutral. See e.g., Madsen, 114 S.Ct. at 2423-24; Williams, 898 P.2d at 408-09, Pro-Choice Network, 67 F.3d at 386.

The Petitioners do not assert that the Trial Court order, affirmed by the SC Supreme Court, was not content neutral. Instead, they present the court with a fire-and-brimstone collage of first amendment standard quotes that just accuse South Carolina of a "large-scale amputation of First Amendment Jurisprudence" and of ignoring Madsen—even though Madsen is the basis underlying every Court order in this case.

1. The Court's Order Serves Significant Government Interests

The existing injunction and a permanent injunction serve significant governmental interests. Courts consistently have recognized a number of significant government interests that may validly support an injunction limiting or regulating activity in the immediate vicinity of a clinic.

These include: protecting a woman's freedom to seek lawful medical services, ensuring public safety and order, promoting the free flow of traffic, protecting property rights, safeguarding medical privacy, and protecting the health and safety of medical patients. Madsen, 114 S.Ct. at 2526; Williams, 898 P.2d 409-11; Pro-Choice Network, 67 F.3d at 387.

The injunction issued by Judge Pleicones clearly serves a number of these interests, including ensuring safe access to reproductive health services, traffic safety, medical privacy, protecting property rights and maintaining public safety and order. The Court's Order restricts activity around cars entering and leaving the clinic, prohibits blocking ingress and egress to the building and parking lot, prohibits trespassing on the driveway and in the parking lot, prohibits approaches to physicians, and bans excessive noise. The buffer zone and restrictions on blocking access and trespassing ensures that patients can freely enter and leave the clinic, ensuring access to medical services, medical privacy, and protecting property rights and the public safety and order. The restrictions on approaching cars in an other than peaceful manner, on blocking the view of traffic and other prohibitions on interfering with ingress and egress protect traffic safety. The restrictions on approaches to physicians ensures that needed medical personnel can safely and easily enter and leave the clinic, promoting access to medical services and protecting medical privacy. There can be no question that these governmental interests are substantial.

2. The Court's Order Burdens No More Speech Than Necessary in Protecting Those Interests.

The third requirement of Madsen is also satisfied here. While the First Amendment does protect peaceful picketing, leafletting, and other forms of expression, it does

not permit individuals to obstruct public streets or building entrances "and allow[s] no one to pass who did not agree to or listen to their exhortations." Cox v. Louisiana, 379 U.S. 536, 555 (1965)(upholding state law prohibiting the obstruction of public streets and sidewalks); see also Cameron v. Johnson, 390 U.S. 611, 616-17 (1968)(upholding statute banning picketing that obstructs or interferes with access to a courthouse. Nor does the First Amendment prevent government from acting to punish "coercive or obstructionist conduct," independent of the obstructor's message. Pro-Choice Network, 67 F.3d at 395 (Winter, J. concurring); see also United States v. O'Brien, 391 U.S. 367, 382 (1968)(upholding regulations forbidding draft card burning.

The 12-foot buffer zone on either side of the driveway established by Judge Pleicones clearly meets the standard of burdening no more speech than necessary. Where conduct that may include expressive activity interferes with access to a reproductive health care facility, courts have overwhelmingly permitted a buffer zone of limited size that preserves safety, privacy, access to medical care and other significant interests while permitting other avenues of communication. See, e.g., Madsen, 114 S.Ct. at 2527 (upholding a 36-foot buffer zone on public right-of-way around clinic); Williams, 898 P.2d at 412 (60-foot buffer zone); Pro-Choice Network, 67 F.3d at 389 (15-foot buffer zone); Feminist Women's Health Center v. Blythe, 39 Cal. Rptr. 2d 189, 199 (Cal. App. 3 Dist. 1995), cert. denied, 116 S.Ct. 514 (1995)(upholding buffer zone); Horizon Health Center v. Felicissimo, 659 A.2d 1387, 1390 (N.J. App.) cert. denied, 667 A.2d 191 (N.J. 1995)(upholding 36-foot buffer zone); Fischer v. City of St. Paul, 894 F. Supp. 1318, 1329 (D. Minn. 1995) (upholding police action erecting fence around clinic to create a 20-foot buffer zone). As set forth above, the injunction upheld in Madsen was a 36-foot buffer zone. Even though the conduct of the appellants in this case and the physical characteristics of the

location create an even more compelling case than those in Madsen, the injunction issued by Judge Pleicones is only one-third on the site already approved by the Supreme Court and smaller than those upheld in the other decisions cited above.

Efforts by the appellants to block access to the clinic, including standing in the driveway, attempting to impede cars entering and leaving the clinic, stopping individuals seeking to enter or leave the clinic, creating a threatening climate of harassment and intimidation by yelling at patients and staff, and other behaviors justify a buffer zone of the limited size proposed in this case. Indeed, this twelve-foot zone is smaller in size than many that courts have upheld. It permits free access, while allowing appellants other avenues of communication. They may stand on the property of the adjacent Women's Center, stand anywhere outside the 12-foot buffer zone, show signs clearly visible within the zone, and approach individuals outside the zone.

The aspects of the Court's Order governing traffic safety include preventing defendants from stopping or otherwise interfering with the free flow of traffic entering or leaving the clinic, from blocking the view of oncoming street traffic for vehicles exiting the clinic, and from approaching any vehicle in an other than peaceful manner. Courts have upheld buffer zones that prohibit individuals form occupying driveways or even streets around clinics to prevent obstruction of vehicle traffic or other traffic safety problems. In Madsen, the 36-foot buffer zone placed protesters all the way across the street and on the opposite sidewalk from the clinic, in part to permit the orderly flow of car traffic. 114 S.Ct. at 2526-27; see also Williams, 898 P.2d at 404-05. In much the same way, the more limited restrictions on the appellants' actual conduct at issue here burden no more speech than necessary to protect traffic safety and permit the free flow of vehicles in and out of the clinic driveway. The appellants' repeated conduct of blocking the driveway and stopping cars justifies this aspect of the injunction. The

appellants are not prohibited from expressing their message, merely form expressing it in a way that blocks traffic or endangers drivers around the clinic area.

The record and even a cursory examination of the location reveals that Judge Pleicones' injunction or even a similar or more severe injunction will give defendants ample opportunities to express their views. Appellant organization owns the property immediately next door to the clinic. Appellants admit welcoming and encouraging all protesters of the clinic. Thus, even if appellants are, for the reasons described above, restricted in their activities on the sidewalks immediately adjacent to the clinic, they can use their own property to engage in lawful protest. Given its proximity to the clinic, anyone who drives by, in or out of the clinic will necessarily see such protest activities. Moreover, if appellants chose to protest along the property line between the properties in ways that are lawful, proper (i.e., not prohibited by Judge Pleicones' Order), they have alternative opportunities for expression. Finally, appellants have the use of the public sidewalks relatively near the clinic's driveway, so long as it is sufficiently restricted to ensure that traffic on Laurens Road is visible to those coming in and out of the clinic. Therefore, this constitutes yet another options for defendants to use in lawfully expressing their view. In short, the existing restrictions or even more severe restrictions will not burden the rights of appellants more that is necessary to serve the government's interests.

Courts have approved limited noise restrictions around health care facilities, where restrictions are reasonable in light of the nature of the facility being protected. Madsen, 114 S.Ct. at 2528; see also NLRB v. Baptist Hospital, 442 U.S. 773, 782-84 (1979)(upholding hospital anti-solicitation rule in patient areas because of effect on health and well-being of patients); Medlin v. Palmer, 874 F.2d 1085 (5th Cir. 1989)(upholding ordinance banning use of a hand-held amplifier within 150 feet of a medical facility); see also Grayned v. City of Rockford, 408

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The evidence in the record shows repeated loud and intrusive noisemaking, including the use of bullhorns (R. p. 082-083, 089, 092, 099, 103-107, 121, 126, 133, and 143-144), shouting and yelling (R. p. 407-B, 407-C) and other forms of disturbing noise, and evidence that the noise disturbs patients seeking medical care (R. p. 109-110). The defendants may still make themselves heard by using ordinary speech to individuals entering and leaving the clinic. They are only barred from using bullhorns land loudspeakers and excessively loud shouting. Thus the noise restriction burdens no more speech than necessary to protect the health and well being of patients seeking medical care.

Thus, all the elements set forth in Madsen are present in this case. The existing injunction (or even a more restrictive injunction) based on the framework of Judge Pleicones' injunction is content neutral, seems a significant governmental interest, and burdens no more free speech than is necessary. Madsen and Schenck v. Pro-Choice Network were the guideposts for the trial Court and to claim South Carolina ignored these cases borders on ludicrous.

Likewise, there is no conflict with this Court's decision in NAACP v. Clairborne Hardware, Co., 458 U.S. 886 (1982). In Clairborne, several organizations and persons organized a massive boycott of white-owned businesses in an effort to obtain concessions regarding racial equality. The boycott did involve some threats, violence and coercion to influence other black citizens not to break the boycott. The trial court found that their conduct was not protected under the First Amendment and found a host of entities liable for malicious interference with business relations and found violations of two Mississippi statutes and enjoined further boycott activity. The Mississippi Supreme Court affirmed the finding of malicious interference and the injunction but found the state statutory provisions were inapplicable. This Court found that the injunction against further boycott

activity violated the first amendment. The case *sub judice* is markedly different. Petitioners right to protest is recognized as protected under the First Amendment and the South Carolina Courts crafted their injunction to still allow this protected speech. However, the Petitioners seem to think that the First Amendment gives them a free pass to do anything—such as put patrons of the clinic in danger by blocking their view of traffic and creating a danger that Petitioners even recognize. Also, the South Carolina Courts found that Petitioners evinced a specific goal to put Respondent specifically out of business—unlike the Mississippi boycott which was directed at all white businesses for specific political reasons.

Petitioners also assert that the Supreme Court of South Carolina, in affirming the narrowly drawn injunction, violated principles set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Because they did not win, Petitioners seem to think that the Courts of South Carolina did not really listen or scrutinize the facts. The content of the Injunctive Orders clearly refutes this unfounded allegation. Petitioners further claim that South Carolina Courts violated Thompson v. City of Louisville , 362 U.S. 199, 206 (1960), which dealt with a man convicted of loitering when no evidence supported this finding. Here, the record is replete with evidence that the Petitioners targeted Palmetto State Clinic to close down and created danger to patrons by blocking ingress and egress from a very busy Greenville Street.

The South Carolina Courts, in narrowly crafting the injunctive relief sought, were mindful of the requirements set down by this Court and adhered to them. Petitioners simply do not like the result—so they allege that the South Carolina Courts of bizarre things, such as dismantling the First Amendment or not listening to the evidence.

Any subsequent change in South Carolina statutory law which may effect this case should properly be brought before the Circuit Court of South Carolina

Petitioners also claim that the "South Carolina Religious Freedom Act" (SCRFA), passed after the litigation in this case, effects or nullifies the injunction. It is Respondent's position that this Act in no way effects the judgment in that the injunction complies with the SCRFA. However, any challenge Petitioners want to make based on this new law should properly be done in the South Carolina Circuit Court for a Declaratory Judgment.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's petition for a writ of certiorari.

Respectfully Submitted,

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98-2006

No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES

PASTOR MICHAEL CLOER AND PASTORS FOR LIFE, INC.

Petitioners,

v.

THE GYNECOLOGY CLINIC, INC.
D/B/A PALMETTO STATE MEDICAL CENTER,

Respondent.

OPPOSITION BRIEF TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTORY FACTS

Gynecologic Clinic, Inc., which is known as "Palmetto State Medical Center" (Palmetto State) is a medical facility, which performs OB/GYN, services, as well as clinical abortions. It is undisputed that it is located on an extremely busy street—Laurens Road in Greenville. Appellants object to the provision of abortion and engage in activities to stop the provision of abortion.

In their Petition for Writ of Certiorari, Petitioners asserted that the South Carolina Courts lightly imposed injunctive relief to stop the "lawful conduct" of protesters holding picket signs and crowding the clinic driveway. They recklessly assert that the South Carolina Supreme Court did not examine the basis for imposing the injunction (App. Brief p. 21). However, the facts are different than presented by Petitioner—so much so that the South Carolina Supreme Court unanimously affirmed the injunction.

Appellant Cloer is a pastor in Greenville who is a leader of "Pastors for Life". He has admitted to trespassing on the clinic property in the past—and even blockading the doors (R. p. 234, Lines 13-24). Cloer admitted that his goal was to close down the clinic (R. p. 235, lines 4-6). He has admitted to using a bullhorn to preach and lead crowds outside the clinic (R. p. 232, lines 1-3) and that the bullhorn can emit excessive noise (R. p. 234, lines 9-12). Cloer admits that the road in front of the clinic is "dangerous" (R. p. 230, line 18).

Cloer is currently the "National Director" for co-Appellant, Pastors for Life, and was their former "Local Director" (R. p. 226, line 9-12). Pastors for Life is the owner of property next door to the clinic. While Cloer, as "Director" for Pastors for Life, acknowledged a duty to mitigate safety hazards (R. p. 230, lines 11-15) and acknowledged that the organization could set rules for people to protest the clinic (R. p. 230, lines 2-10), it has no such rules or safeguards (R. p. 230 lines 18-20). Cloer admits to being "on notice" of severe ingress/egress problems at the clinic, due to the protesters blocking vision, for approximately three years (R. p. 233, lines 2-8).

It is undisputed that Pastors for Life owns the lot next door to the clinic and has allowed the lot to be used as a "base" for anti-abortion activities. Cloer stated it was his "intent that by providing a base where protesters and counselors could operate you could slowly effect the status of the clinic" (R. p. 236, lines 21-24). Cloer has been arrested 5 or 6 times regarding protesting abortion, including being arrested for blockading the clinic in 1989. Two other members of Pastors for Life's Board have also been arrested for blockading the doors of Greenville abortion providers (R. p. 240, lines 6-15). Cloer admits that he, on behalf of Pastors for Life, has a calendar and coordinates which protesters show up (R. p. 241, lines 13-18). When co-Defendant (in the State Circuit case) Ruth Trippi and another protester were jailed by the Honorable Larry Patterson for willfully violating the temporary injunction in this case, Cloer hailed them as "heroes" . Much testimony presented at all the hearings concerned an individual named Richard Cash. Cash is employed by Pastors for Life, by Cloer's recommendation (R. p. 226, lines 23-24). He has participated in approximately 20 "rescues", including the prior one at Palmetto State (R. p. 214, lines 7-23). He admits to helping "organize and lead" the 1992 "rescue" at Palmetto State (R. p. 215, lines 6-20). Cash readily acknowledges that his goal is to stop abortion, which includes blockading doors (R. p. 217, lines 11-12). Cash is at the clinic basically from its opening hour to its close (R. p. 218, lines 14-17). Cash has been arrested fifteen or twenty times—so many, he cannot remember the number of his arrests (R. p. 224, lines 13-15, R. p. 225, line 7). All were for abortion activity.

Facts regarding impeding ingress/egress of traffic

At the September 7, 1994 hearing, Officer Jefferson of the Greenville City Police Department testified regarding driving his car through the clinic driveway (which shares a driveway with Pastors for Life's property). The Officer testified that he observed drivers going out of the clinic were unable to see the traffic flow they were entering, due to protesters and their signs obstructing the view. In fact, the Officer testified that he could not see more than five steps from his car due to visual obstruction by the protesters. Richard Metcalf, a former security guard for the clinic, testified that he observed Cash and other protesters standing in front of vehicles—where the drivers were unable to see either way when trying to enter

the flow of traffic. He further testified that they put their signs and arms in front of the windshields of cars leaving the clinic. Similarly, Elizabeth O'Conner testified that, when exiting the clinic, she could not see the flow of traffic due to the protesters on both sides of the driveway. (R. p. 272-275 R. p. 281-282, and R. p. 285-294). Even a former patient testified that after her operation, when she tried to exit the clinic driveway onto Laurens Road, she could not see oncoming traffic—because Richard Cash (of Pastors for Life) and another protester were holding big signs blocking her vision (R. p. 243-246). She testified that her mother (the actual driver) had to "blindly" pull out and just hope an accident did not result (R. p. 245, lines 22-24).

According to the security guard for the clinic, "There's usually protesters on both sides of the driveway. Depending on, well, the layout of this property itself, either way it's an impairment to vision" (R. p. 169, lines 13-16).

It is undisputed that there are safety concerns due to the flow of traffic on this busy street and the Petitioners do not even challenge the factual findings regarding the substantial blockage of vision and egress/ingress. Instead, they seem to feel they have a constitutional right to put others in danger.

Facts regarding Excessive Noise and Noise Amplification

At the September 7, 1994 hearing, Ricki Riddle, former Manager of Palmetto State, testified that while inside the clinic she could hear loud chanting and preaching—which was clearly audible (R. p. 082-083). Ricki also heard bullhorns used outside and had to turn up the radio inside to drown the noise created from the protesters. Richard Metcalf testified that he had personally seen Trippi and Cash yelling into the window area in front of the clinic. His pleas to stop the noise were ignored. Metcalf has seen Trippi with the bullhorn (R. p. 089). Richard Fuller and Elizabeth O'Connor (R. p. 121) testified to seeing Appellant Cloer with the bullhorn (R. p. 099). Kern testified to seeing Cloer with the bullhorn to engage the protesters in loud chanting and singing (R. p. 103-105).

Facts Regarding Harassment and Threats

At the September 7, 1994 hearing, Richard Metcalf testified that Trippi told him "we have assault rifles and it's perfectly legal to have them" (R. p. 091-092). Kern testified that, following the well-publicized shooting of a doctor from a clinic in Pensacola, Florida, by a protester, Trippi was standing on the building owned by Pastor's for Life and yelled at her "you're next" (R. p. 112). She also testified to being threatened by Cash (R. p. 117). Curtis Hinkle (a volunteer escort) testified that two protesters cornered him with his back against the wall the clinic. Because he did not want to provoke an altercation, he stayed pinned there—subjected to continuous lecturing and readings from the protesters (R. p. 126). Neal McFarland testified to co-Defendants Trippi and Walsh—with Cash (employee of Pastors for Life)—harassing patients coming on to the facility in a manner which could only be construed as abusive and harassing (R. p. 407-C) and of co-Defendant Trippi striking an escort with a protest sign (R. p. 412).

McFarland testified to hearing Cash approach Kim Chamness, an employee and say "What's the matter, are you afraid you'll get shot?" (R. p. 179, lines 21-22).

This is not only an emotional situation, but also a potentially dangerous one. The clinic only requested reasonable safeguards for its employees and patients.

The Injunctive Relief Granted

The terms of the injunction were narrowly drawn to simply address the evidence presented and the finding of civil conspiracy. The Petitioners now cannot trespass on the clinic property and stand in the clinic driveway (which they have no colorable right to do anyway). They were also ordered to stay 12' from the driveway, which the Court concluded from the evidence presented would be the minimal distance to ensure that drivers could see oncoming traffic to exit the clinic and cars could safely pull in from Laurens road. The Petitioners also now cannot use their bullhorns, loudspeakers or by screaming which can be heard inside the clinic by someone of ordinary hearing.

A WRIT OF CERTIORARI SHOULD NOT BE GRANTED. THERE IS NO CONFLICT WITH PRECEDENT FROM THIS COURT OR APPLICABLE CONFLICTS WITH OTHER STATE HIGH COURTS.

There is no conflict with the Texas Supreme Court

The Petitioners assert that the case *sub judice* is in direct conflict with the Supreme Court of Texas in Valenquela v. Aquino, 853 S.W. 2d 512 (Tex. 1993). In Valenquela, Dr. Aquino obtained a jury verdict against protesters picketing his residence on the sole theory of negligent infliction of emotional distress. The Court also awarded damages and imposed a 400' buffer zone around Aquino's home. However, since Texas has never recognized the theory negligent infliction of emotional distress, the case was reversed.

However, Aquino also sued for invasion of privacy—and the Court's opinion is not clear whether this theory was simply not charged or whether it was dismissed. The Texas Supreme Court remanded the case back to trial on the privacy issue. The Court made no ruling about the effect, if any, law protecting privacy interests would have on concurrent law protecting civil rights. Indeed, they stated "Absent findings or evidence to establish Valenquela's liability to Aquino, we decline to debate the very important and difficult but nevertheless hypothetical issue of whether Valenzuela's constitutional rights might provide a shield from such liability if it were ever established" Aquino at 853 S.W.2d 513.

It is puzzling why the Petitioners believe that South Carolina's law on civil conspiracy has anything to do with Texas' decision not to recognize negligent infliction of emotional distress—in any circumstance—as a viable legal theory. Any "conflict" the Aquino case has with the one *sub judice* is far-fetched at best.

SOUTH CAROLINA'S RULING IS CONSISTENT WITH THE PRECEDENT ESTABLISHED BY THIS COURT.

Petitioners also assert that South Carolina trampled on five cases earlier decided by this Court. Petitioners seem not to notice that South Carolina used these very cases in making its ruling and tailored the injunctive relief specifically by the guidelines established by this Court.

The United State Supreme Court's decision in Madsen v. Women's Health Center, 512 U.S. 1277, 114 S.Ct. 2516, reh'g denied, 115 S.Ct. 23 (1994), provides the proper standard for evaluating whether an injunction regulating activity around a reproductive health center facility violates the First Amendment to the United States Constitution. In that case, the Court upheld provisions of an injunction establishing a 36-foot buffer zone around the entrances and driveway of a reproductive health care clinic and imposing certain noise restrictions around the clinic. The Court held that an injunction passes Constitutional muster even if its has the effect of limiting expressive activity in and around a medical facility if it is (1) content neutral, id. at 2523; (2) serves a significant government interest, id.; and (3) burdens no more speech than necessary to protect that interest, id. See also Pro-Choice Network v. Schenck, 67 F.3d 377, 386 (2nd Cir. 1995) in banc, cert. granted, 116 S.Ct. 1260 (1996)(applying Madsen analysis to uphold injunction creating fifteen-foot buffer zone around clinic entrances and fifteen-foot bubble zones around individuals and cars approaching and leaving clinics); Planned Parenthood Shasta Diablo, Inc. v. Williams, 898 P.2d 402, 402 (Cal. 1995, pet. for cert. filed, Oct. 10, 1995 (applying Madsen to uphold 60-foot buffer zone). As the California Supreme Court stated, "Madsen conclusively affirmed the principle which many lower courts – including our own – had previously endorsed, that a narrowly drawn 'buffer zone' around a family planning clinic may be justified if it advances significant state interests." Williams, 898 P.2d at 409. Madsen is quoted and applied throughout the Orders issued by both the Trial Judge and the South Carolina Supreme Court.

The Court's Order is Content-Neutral.

The Court's Order of July 15, 1997 is clearly content-neutral. It singles out no specific message. It only regulates the conduct of defendants, and makes no reference to the content of their speech. Courts have consistently found injunctions that govern the conduct of individuals around reproductive health care facilities to be content-neutral. See e.g., Madsen, 114 S.Ct. at 2423-24; Williams, 898 P.2d at 408-09, Pro-Choice Network, 67 F.3d at 386.

The Petitioners do not assert that the Trial Court order, affirmed by the SC Supreme Court, was not content neutral. Instead, they present the court with a fire-and-brimstone collage of first amendment standard quotes that just accuse South Carolina of a "large-scale amputation of First Amendment Jurisprudence" and of ignoring Madsen—even though Madsen is the basis underlying every Court order in this case.

1. The Court's Order Serves Significant Government Interests

The existing injunction and a permanent injunction serve significant governmental interests. Courts consistently have recognized a number of significant government interests that may validly support an injunction limiting or regulating activity in the immediate vicinity of a clinic. These include: protecting a woman's freedom to seek lawful medical services, ensuring public safety and order, promoting the free flow of traffic, protecting property rights, safeguarding medical privacy, and protecting the health and safety of medical patients. Madsen, 114 S.Ct. at 2526; Williams, 898 P.2d 409-11; Pro-Choice Network, 67 F.3d at 387.

The injunction issued by Judge Pleicones clearly serves a number of these interests, including ensuring safe access to reproductive health services, traffic safety, medical privacy, protecting property rights and maintaining public safety and order. The Court's Order restricts activity around cars entering and leaving the clinic, prohibits blocking ingress and egress to the building and parking lot, prohibits trespassing on the driveway and in the parking lot, prohibits approaches to physicians, and bans excessive noise. The buffer zone and restrictions on blocking access and trespassing ensures that patients can freely enter and leave the clinic, ensuring

access to medical services, medical privacy, and protecting property rights and the public safety and order. The restrictions on approaching cars in an other than peaceful manner, on blocking the view of traffic and other prohibitions on interfering with ingress and egress protect traffic safety. The restrictions on approaches to physicians ensures that needed medical personnel can safely and easily enter and leave the clinic, promoting access to medical services and protecting medical privacy. There can be no question that these governmental interests are substantial.

3. The Court's Order Burdens No More Speech Than Necessary in Protecting Those Interests.

The third requirement of Madsen is also satisfied here. While the First Amendment does protect peaceful picketing, leafletting, and other forms of expression, it does not permit individuals to obstruct public streets or building entrances "and allow[s] no one to pass who did not agree to or listen to their exhortations." Cox v. Louisiana, 379 U.S. 536, 555 (1965)(upholding state law prohibiting the obstruction of public streets and sidewalks); see also Cameron v. Johnson, 390 U.S. 611, 616-17 (1968)(upholding statute banning picketing that obstructs or interferes with access to a courthouse. Nor does the First Amendment prevent government from acting to punish "coercive or obstructionist conduct," independent of the obstructor's message. Pro-Choice Network, 67 F.3d at 395 (Winter, J. concurring); see also United States v. O'Brien, 391 U.S. 367, 382 (1968)(upholding regulations forbidding draft card burning.

The 12-foot buffer zone on either side of the driveway established by Judge Pleicones clearly meets the standard of burdening no more speech than necessary. Where conduct that may include expressive activity interferes with access to a reproductive health care facility, courts have overwhelmingly permitted a buffer zone of limited size that preserves safety, privacy, access to medical care and other significant interests while permitting other avenues of communication. See, e.g., Madsen, 114 S.Ct. at 2527 (upholding a 36-foot buffer zone on public right-of-way around clinic); Williams, 898 P.2d at 412 (60-foot buffer zone); Pro-Choice Network, 67 F.3d at 389 (15-foot buffer zone); Feminist Women's Health Center v. Blythe, 39 Cal. Rptr. 2d 189, 199 (Cal. App. 3 Dist. 1995), cert. denied, 116 S.Ct. 514 (1995)(upholding buffer zone); Horizon Health

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Likewise, there is no conflict with this Court's decision in NAACP v. Clairborne Hardware, Co., 458 U.S. 886 (1982). In Clairborne, several organizations and persons organized a massive boycott of white-owned businesses in an effort to obtain concessions regarding racial equality. The boycott did involve some threats, violence and coercion to influence other black citizens not to break the boycott. The trial court found that their conduct was not protected under the First Amendment and found a host of entities liable for malicious interference with business relations and found violations of two Mississippi statutes and enjoined further boycott activity. The Mississippi Supreme Court affirmed the finding of malicious interference and the injunction but found the state statutory provisions were inapplicable. This Court found that the injunction against further boycott activity violated the first amendment. The case *sub judice* is markedly different. Petitioners right to protest is recognized as protected under the First Amendment and the South Carolina Courts crafted their injunction to still allow this protected speech. However, the Petitioners seem to think that the First Amendment gives them a free pass to do anything—such as put patrons of the clinic in danger by blocking their view of traffic and creating a danger that Petitioners even recognize. Also, the South Carolina Courts found that Petitioners evinced a specific goal to put Respondent specifically out of business—unlike the Mississippi

boycott which was directed at all white businesses for specific political reasons.

Petitioners also assert that the Supreme Court of South Carolina, in affirming the narrowly drawn injunction, violated principles set forth in New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Because they did not win, Petitioners seem to think that the Courts of South Carolina did not really listen or scrutinize the facts. The content of the Injunctive Orders clearly refutes this unfounded allegation. Petitioners further claim that South Carolina Courts violated Thompson v. City of Louisville , 362 U.S. 199, 206 (1960), which dealt with a man convicted of loitering when no evidence supported this finding. Here, the record is replete with evidence that the Petitioners targeted Palmetto State Clinic to close down and created danger to patrons by blocking ingress and egress from a very busy Greenville Street.

The South Carolina Courts, in narrowly crafting the injunctive relief sought, were mindful of the requirements set down by this Court and adhered to them. Petitioners simply do not like the result—so they allege that the South Carolina Courts of bizarre things, such as dismantling the First Amendment or not listening to the evidence.

Any subsequent change in South Carolina statutory law which may effect this case should properly be brought before the Circuit Court of South Carolina

Petitioners also claim that the "South Carolina Religious Freedom Act" (SCRFA), passed after the litigation in this case, effects or nullifies the injunction. It is Respondent's position that this Act in no way effects the judgment in that the injunction complies with the SCRFA. However, any challenge Petitioners want to make based on this new law should properly be done in the South Carolina Circuit Court for a Declaratory Judgment.

Conclusion

For the foregoing reasons, this Court should deny Petitioner's petition for a writ of certiorari.

Respectfully Submitted,

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(4)

No. 98-2006

IN THE

Supreme Court of the United States

PASTOR MICHAEL CLOER AND PASTORS FOR LIFE, INC.
Petitioners,

v.

THE GYNECOLOGY CLINIC, INC.,
D/B/A PALMETTO STATE MEDICAL CENTER,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of South Carolina

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REPLY TO BRIEF IN OPPOSITION

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DECISION BELOW

Subsequent to the filing of the petition, the decision of the Supreme Court of South Carolina, reprinted in the Appendix to the Petition at 1a, has been published as *Gynecology Clinic, Inc. v. Cloer*, 334 S.C. 555, 514 S.E.2d 592 (1999)

REPLY ON STATEMENT OF MATERIAL FACTS

The respondent understandably seeks to muddle the controlling, clear factual determination of the South Carolina Supreme Court that, even if petitioners' conduct was "protected by the First Amendment" and "lawful," that would not shield petitioners from liability. Pet. App. 2a.

- **The Operative Findings of Fact by the Trial Court**

The decision below affirmed the judgment of the trial court. Pet. App. 3a. The trial court, on petitioners' reconsideration motion, concluded that its decision "perhaps lumps all of the Defendants together too readily," Pet. App. 19a. That said, the trial court identified the "two pieces of evidence [that] clearly besp[oke] an intention shared by" petitioners "to injure the business" of respondent, Pet. App. 21a. Those two pieces of evidence were:

▸ a letter placed in evidence by Pastor Cloer, written to other pastors who participated with him in Pastors for Life, Inc., in which he stated:

> "It would be difficult to overstate the importance of locating a CPC . . . next door to the abortion mill. Not only will the CPC provide a much needed service to mothers and babies in the inner city . . . but in doing so it will undercut the "business" of the abortion mill, and thereby play a key role in closing it down."

Pet. App. 20a (quoting letter).[1]

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1. The trial court omitted these opening words from the Cloer letter: "Pastors for Life is committed to making upstate South Carolina an abortion-free area and ministering to mothers and babies in need. Now we have an unprecedented opportunity to accomplish both objectives by putting a Crisis Pregnancy Center (CPC) right next door to the killing center on Laurens Road." R. 362.

▸ a videotape, dated September 3, 1994, showing Richard Cash, who was not sued by respondent, holding a picket sign which read "'Don't turn in, Keep Going,'" Pet. App. 20a, while he stood on the sidewalk at the end of the driveway shared by Pastors for Life, Inc. and respondent, *id.*[2]

- **Misstatements of Facts about Petitioners by Respondent**

Respondent make numerous significant misrepresentations about the facts in the record and focuses its attention on persons, including nonparties, before this Court. This effort apparently reflects respondent's understanding that the court below erred in concluding that a judgment of liability could, consistent with the United States Constitution, rest on evidence that petitioners engaged in constitutionally protected activities. Among the misrepresentations:

▸ that Pastor Cloer had trespassed on respondent's property, Opp. Br. at 1, when Cloer's long-abandoned participation in one Operation Rescue style blockade took place before respondent purchased the facility, R. 238.

▸ that Pastor Cloer had the goal of shutting down respondent's business, Opp. Br. at 1, when the uncontradicted evidence was that Cloer opposed legalized abortion generally, R. 235, and did not object to business existence of respondent apart from its abortion activities, *id.*

▸ that Pastor Cloer admitted that his bullhorn emitted loud and excessive noise, Opp. Br. at 1, when "loud and excessive" was a characterization made by respondent's counsel, not Cloer, R. 280.

▸ that Pastor Cloer "admits to being 'on notice' of severe ingress/egress problems at the clinic, due to the protesters blocking vision, for approximately three years," Opp. Br. at 2,

2. The trial court attributed Richard Cash's conduct to Pastors for Life even though the uncontradicted evidence at trial showed that Cash was not an employee at the time of the incident depicted in the videotape, R. 226.

when Pastor Cloer denied the truth of that factual characterization, R. 231.

▸ that Pastor Cloer admitted coordinating a protest calendar, Opp. Br. at 2, when Pastor Cloer admitted coordinating prayer services and prayer rallies, R. 241.

Respondent's factual recitation suffers from the same defect that the trial court acknowledged had been found in its initial decision: respondent "lumps all of the Defendants together too readily." Among the erroneous factual assertions in this category, respondent wrongly implicates petitioners for

▸ impediments to ingress/egress, Opp. Br. at 3-4, caused, if at all, by others, *id.*;[3]

▸ excessive noise and noise amplification problems inside respondent's facility, Opp. Br. at 4, based on testimony about the conduct of others, *id.*; and

▸ harassment and threats, Opp. Br. at 4-5, carried out, if at all, by others, *id.*

REPLY ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

A. *Madsen v. Women's Health Center, Inc.*

Respondent ignores the central fact in *Madsen v. Women's Health Center*, 512 U.S. 753 (1994). That central fact is that the injunctive relief granted in that case was premised on the bad acts of those whose conduct was enjoined, not the bad acts of others. 512 U.S. at 763 n.2; *id.* at 765 n.3. No other synthesis of *Madsen* and *Claiborne Hardware Co.* gives effect

3. Petitioners do not concede that impediments to ingress/egress were established on the record. The character of the evidence relied on by respondent is suspect. Only one clinic patron testified; on direct examination, she offered a compelling story about the difficulty she experienced getting in and out of the clinic's driveway; on cross examination, that patron admitted that her testimony was false and that one of respondent's attorneys, Marvin Quattlebaum, had assured her that it was permissible to give false testimony under oath. R. 248-64.

to the holdings in both cases, and nothing said by this Court in *Madsen* suggests an abrogation of *Claiborne Hardware Co.* In the present case, petitioners were adjudged civilly liable and the exercise of their constitutional rights restricted on evidence of that they engaged in "lawful" constitutionally protected conduct. Respondent's failed attempt to harmonize the judgment below with *Madsen* results from respondent's erroneous belief that so long as *somebody* did wrong, petitioners may be held accountable.

B. *Schenck v. Pro-Choice Network of Western New York*

Respondent's opposition completely ignores *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997). Instead, respondent cites to and relies upon the decision of the United States Court of Appeals for the Second Circuit in *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2nd Cir. 1995). Respondent seems unaware that, over two years ago, this Court reversed in part, affirmed in part, vacated in part and remanded that decision of the second circuit. *Schenck*, 519 U.S. 357.

C. *NAACP v. Claiborne Hardware Co.*

Like the decision of the South Carolina Supreme Court, respondent's argument proceeds on a defective, fundamentally flawed premise. That false premise is that the "lawful" exercise of constitutional rights to freedom of speech, of association, and of religion can support a judgment of civil liability and injunctive restrictions on the exercise of those rights. *But see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (injunctive relief must be crafted to "restrain only unlawful conduct and persons responsible for conduct of that character"); *cf. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293 (1941) ("it is of prime importance that no constitutional freedom . . . be defeated by insubstantial findings of fact screening reality. . . . [F]ree speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the

conclusion that otherwise peaceful picketing has the taint of force").

The only ground of distinction respondent offers is that the boycott at issue in *Claiborne Hardware Co.* was "directed at all white businesses for specific political reasons," Opp. Br. at 14, while "Petitioners evinced a specific goal to put Respondent specifically out of business," *id.* That ground of distinction is without merit.

First, the undisputed evidence in the record is that petitioners' goal was to end legalized abortion in this country, not to drive respondent out of business. R. 328B-29A. To accomplish that goal, as the uncontradicted record shows, petitioners exclusively engaged in peaceful expressive activities – praying, singing, counseling, leafletting, preaching, marching, demonstrating. R. 141-42, 144, 145, 149-50, 151-57, 327-29.

Second, although the boycott in Claiborne County, Mississippi, was motivated by a specific political goal of obtaining equal treatment for the black residents of the county, both in their dealings with the government and with its white-owned businesses, *Claiborne Hardware Co.*, 458 U.S. at 899 n.26, the boycott was carried out by coercive, coordinated refusals to have commerce with those specific, white-owned businesses in the county, *id.* at 900.

The parallels between the decision below and the decision of the Mississippi Supreme Court reversed in substantial part by this Court's decision in *Claiborne Hardware Co.* are striking. Respondent fails to address those parallels squarely, because the judgment below against petitioners cannot stand in light of *Claiborne Hardware Co.*

D. *Thompson v. City of Louisville*

Respondent offers only one defense to the disparity between the judgment below and the outcome in *Thompson v. Louisville*, 362 U.S. 199 (1960); respondent contends that "the record is replete with evidence that the Petitioners targeted Palmetto State Medical Center to close down and created

danger to patrons by blocking ingress and egress from a very busy Greenville Street." Opp. Br. at 14. The problem for respondent is that the judgment below rests on the conclusion that petitioners' "lawful" conducted "protected by the First Amendment," Pet. App. 2a, can be the source of civil liability under South Carolina. Thus, no matter how respondent characterizes the record, the court below assumed that the evidence regarding petitioners consisted of proof of such "lawful" conduct "protected by the First Amendment." The court below, however, did not treat the constitutional dimension of petitioners' expressive activities as anything more significant than a speed bump on the road to an affirmance of the trial court's judgment.

E. *New York Times Co. v. Sullivan*

Respondent misses the mark regarding the duty of a reviewing court "in proper cases" to "review the evidence to make certain that [constitutional] principles have been constitutionally applied," *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964). Opp. Br. at 14. The striking conclusion of the South Carolina Supreme Court cannot be winked. Under respondent's approach to *New York Times Co.*, there is no constitutional difficulty in premising civil liability and restrictions on constitutional freedoms on evidence of the exercise of those constitutional freedoms.

F. The Public Forum Cases

Again, respondent misses the mark. In this case, there is no basis in fact for asserting that petitioners have engaged in a course of unlawful conduct. *Supra* at 1-3 (discussing facts in record). Nonetheless, the court below affirmed the entry of an injunction that bars petitioners from engaging in the exercise of constitutionally protected rights of expression. Pet. App. 1a-3a; *id.* at 8a. That injunction works an absolute prohibition on "picketing[and] demonstrating" in the affected area, Pet. App. 8a. Consequently, under the Public Forum Doctrine cases, *see, e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983), the

court below should have considered whether the injunctive restrictions were "narrowly drawn to accomplish a compelling governmental interest," *id.* But respondent argues that the injunction serves "significant governmental interests." Opp. Br. at 8. Thus, respondent impliedly concedes that the appropriate scrutiny was not brought to bear on the injunction.

II. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE TEXAS SUPREME COURT.

Respondent fails to show that the decision below is not in conflict with the decision of the Texas Supreme Court in *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993). The precise conflict between the decision below and the decision in *Valenzuela* is on the question of whether a permanent injunction restricting the exercise of constitutionally protected rights of expression may be sustained without a constitutionally sufficient finding of legal liability. Compare Pet. at 22-24 with Opp. Br. at 6-7. In Texas, it may not, *Valenzuela*, 853 S.W.2d at 514 n.2; in South Carolina, it may, Pet. App. 2a-3a.

III. THE SOUTH CAROLINA RELIGIOUS FREEDOM ACT IS A SUFFICIENT INTERVENING DEVELOPMENT OF CIRCUMSTANCE OR LAW TO WARRANT THIS COURT'S ORDER GRANTING THE PETITION, VACATING THE JUDGMENT BELOW, AND REMANDING THE CASE FOR FURTHER CONSIDERATION.

Respondent contends that the "South Carolina Religious Freedom Act," S.C. Code §§ 1-32-10 *et seq.* (SCRFA), "in no way effects [sic] the judgment *in that the injunction complies with the SCRFA*." Opp. Br. at 15 (emphasis added). Respondent's implication is plain: the judgment below and the injunction it affirms are subject to review under the South Carolina Religious Freedom Act. Respondent simply satisfies itself, without any court having considered the question, that the judgment and the injunction survive the level of scrutiny mandated by SCRFA. The settled practice of this Court,

however, is that an intervening change of circumstance or law warrants the entry of an order granting the petition, vacating the judgment below, and remanding for further consideration in light of the changed circumstance. *See* Pet. at 28 n.9 (and accompanying text). Thus, respondent has failed to demonstrate why the petition should not be granted, the decision below vacated, and the matter remanded for further consideration prior to review in this Court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition and either summarily reverse the decision of the Supreme Court of South Carolina or set the matter down for consideration on the merits.

In the alternative, this Court should grant the petition, vacate the decision below, and remand the case for further consideration in light of the newly enacted SCRFA.

Respectfully submitted,

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Dated: November 8, 1999

Attorneys for Petitioners

SUPREME COURT OF THE UNITED STATES

MICHAEL CLOER AND PASTORS FOR LIFE, INC. *v.*
GYNECOLOGY CLINIC, INC., DBA PALMETTO
STATE MEDICAL CENTER

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

No. 98–2006. Decided January 10, 2000

The petition for a writ of certiorari is denied.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting from the denial of certiorari.

Petitioner Michael Cloer is senior pastor of Siloam Baptist Church in Easley, South Carolina, and the founder and director of petitioner Pastors for Life, Inc., a group of pastors dedicated to protesting against, and offering alternatives to, abortion. Since 1989, Pastor Cloer and Pastors for Life have organized protests outside Palmetto State Medical Center, a facility in Greenville, South Carolina, operated by respondent Gynecology Clinic, Inc., that performs abortions.

In 1994, respondent filed suit against Cloer, Pastors for Life, and others, in South Carolina state court, alleging private nuisance, public nuisance, and civil conspiracy under state law. Respondent initially sought injunctive relief and damages, but subsequently waived its claim for damages. The trial court granted defendants' motion to dismiss the public-nuisance cause of action; after a bench trial, it rendered judgment for defendants on the private-nuisance claim, and for respondent on the civil-conspiracy claim. It entered an injunction barring the defendants from (1) trespassing on the private property of the clinic; (2) interfering with ingress to and egress from the clinic; (3) interfering with the free flow of traffic on the property of the clinic and adjoining public streets and sidewalks

and approaching any physician employed by the clinic or any vehicle containing such a physician; (4) protesting within a 12-foot buffer zone along the public sidewalk on either side of the driveway of the clinic; (5) obstructing the view of street traffic by any vehicle that is attempting to exit the clinic; and (6) making any noise that would be heard inside the clinic. App. to Pet. for Cert. 8a–9a. The South Carolina Supreme Court affirmed the judgment in a summary opinion. 334 S. C. 555, 514 S. E. 2d 592 (1999).

Although in my judgment the scope of the injunction is unconstitutionally broad insofar as it prohibits approaching any physician or any vehicle containing a physician, and prohibits any noise that can be heard inside the clinic during any of its business hours, see *Madsen* v. *Women's Health Center, Inc.*, 512 U. S. 753, 812 (1994) (SCALIA, J., concurring in judgment in part and dissenting in part), there would be nothing about this case warranting our attention if the judgment were based upon, and the scope of the injunction determined by, unlawful acts committed by petitioners. The First Amendment is not a license for lawlessness, and when abortion protesters engage in such acts as trespassing upon private property and deliberately obstructing access to clinics, they are accountable to the law. What makes the present case remarkable, however, and establishes it as a terrifying deterrent to legitimate, peaceful First Amendment activity throughout South Carolina, is the fact that the South Carolina Supreme Court's affirmance did not rest upon its determination that there was adequate evidence of unlawful activity. The analysis contained in its brief *per curiam* opinion begins as follows:

> "Appellants first assert that, because their actions are protected by the First Amendment, they cannot be the basis for a civil conspiracy. Under South Carolina law, lawful acts may become actionable as a civil conspiracy when the object is to ruin or damage the business of another. . . . The record is replete with evidence that appellants' goal is to discourage women from patronizing respondent's business with the goal of making abortion unavailable. Assuming appellants' acts were lawful, that fact does not prevent the finding of a civil conspiracy." 334 S. C., at 556, 514 S. E. 2d, at 592 (internal quotation marks and citations omitted).

This extraordinary application of state civil-conspiracy law to attempts to persuade persons not to patronize certain businesses would outlaw many activities long thought to be protected by the First Amendment—routine picketing by striking unions, for example, and the civil-rights boycotts directed against businesses with segregated lunch counters in the 1960's. It may well be that an attempt, by lawful persuasion, to harm someone's business out of sheer malice, or in order to capture his clientele, can be made illegal. But seeking to harm it (through persuasion) because of principled objection to the nature of the business—whether because of moral disapproval of abortion, or social disapproval of segregation, or economic disapproval of substandard wages—is an entirely different matter. If this sort of persuasive activity can be swept away under state civil-conspiracy laws, some of our most significant First Amendment jurisprudence becomes academic. Consider, for example, how the South Carolina Supreme Court's theory makes a nullity of our statement in a leading case involving the boycott of segregated businesses in Mississippi:

> "A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization

must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 933–934 (1982).

I would also note that even on its own terms the result produced by the South Carolina Supreme Court's opinion is irrational: If seeking to harm an abortion clinic's business through persuasion is indeed unlawful in South Carolina, why does the injunction permit such harm so long as it is inflicted at a distance of 12 feet from the driveway? The cryptic last paragraph of the South Carolina Supreme Court's opinion reads as follows: "Finally, appellants raise numerous evidentiary challenges to the findings of the trial judge which form the basis for the injunctive relief granted respondent. We find no evidentiary or constitutional error in the injunction issued here." 334 S. C., at 557, 514 S. E. 2d, at 593. Given what preceded (and avoiding the attribution of illogic to the South Carolina Supreme Court), this can mean nothing more than that the evidentiary findings supporting civil conspiracy, which would have justified a total ban of the anti-abortion protests, adequately support the more limited ban. But even if it means that the trial court's findings of unlawful acts (such as trespass and obstruction of access) justified the terms of the injunction; and even if it means (quite illogically) that such unlawful acts will always be necessary to fix the scope of *injunctive* relief; the court's plain holding that "discourag[ing] women from patronizing [abortion clinics] with the goal of making abortion unavailable" *id.*, at 556, 514 S. E. 2d, at 592, *is an unlawful civil conspiracy* subjects all such activity—no matter how

peaceful and law abiding—to civil damages.

I would grant certiorari in this case, to consider the constitutionality of a novel civil-conspiracy doctrine that places routine, lawful First Amendment activity under threat of financial liability, and probably under threat of injunction, throughout the State of South Carolina.